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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON,
Attorney General of the State of Utah,
Appellant,

v.

CONNIE R. JONES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 85-2157

CONNIE R. JONES; LYNN F. JONES; CAROLINE A. SNOW; RALPH MCCLEARY; KAY ULRICH; ED ULRICH; WAYNE WILLIAMS, as individuals and as representative of a class of persons similarly situated; COMMUNITY TELEVISION OF UTAH, INC.; COMMUNITY CABLE OF UTAH, INC.; UTAH SATELLITE, INC.; and WASATCH COMMUNITY T.V., INC.,

Plaintiffs-Appellees,

HOME BOX OFFICE, INC.,
Plaintiff-in-Intervention-Appellee,

v.

HONORABLE DAVID L. WILKINSON, Attorney General of the State of Utah, in his official capacity and as representative of a class of all persons empowered to enforce the Cable Television Programming Decency Act (S.B. 309),

Defendant-Appellant,

MORALITY IN MEDIA, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., THE FREEDOM OF EXPRESSION FOUNDATION, INC.,

Amici Curiae.

Appeal from the United States District Court
for the District of Utah
(D.C. Nos. C-83-0551A and C-83-0581A)

[Filed Sept. 8, 1986]

Charles A. Hobbs, Special Assistant Attorney General for the State of Utah, Washington, D.C., and David L. Wilkinson, Attorney General of the State of Utah, Salt Lake City, Utah (Robert N. Parrish, Assistant Attorney General; Theodore A. Shields, of Hobbs, Straus, Dean & Wilder, Washington, D.C., of counsel, with them on the briefs) for Defendant-Appellant.

Bryan L. McDougal, Salt Lake City, Utah, George H. Shapiro of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., and Patricia A. O'Rorke of the American Civil Liberties Union, Salt Lake City, Utah (Donald B. Holbrook and LeGrand R. Curtis, Jr., of Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, James P. Mercurio and Gerald E. Oberst, Jr. of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C., and, of counsel, Faith Wender of Home Box Office, Inc., Los Angeles, California, with them on the brief) for Plaintiffs-Appellees.

Lloyd C. Eldredge, Salt Lake City, Utah, filed a brief for amicus curiae Morality in Media, Inc.

Brenda L. Fox and Seth A. Davidson, Washington, D.C., filed a brief for amicus curiae National Cable Television Association, Inc.

David M. Hunsaker of Putbrese & Hunsaker, McLean, Virginia, and M. Joel Bolstein and Craig R. Smith of Freedom of Expression Foundation, Inc., filed a brief for amicus curiae The Freedom of Expression Foundation, Inc.

Before LOGAN and BALDOCK, Circuit Judges, and SAFFELS, District Judge.*

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* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

PER CURIAM.

Several Utah cable television subscribers, as individuals and as representatives of a class of persons similarly situated, and several Utah cable television operators filed separate suits for declaratory and injunctive relief, challenging the validity, under federal law and the United States Constitution, of the Utah Cable Television Programming Decency Act, Utah Code Ann. §§ 76-10-1701 to -1708 (1983) (the Act). The suits named Utah Attorney General David L. Wilkinson defendant in his individual and official capacities and as representative of the class of Utah officials empowered to enforce the Act. The cases were consolidated and Home Box Office, Inc., a national cable television company, was permitted to intervene as a plaintiff.

The Act treats the showing by cable television systems, or pay-for-viewing television programming, of "indecent material" as a nuisance, punishable by fines and money forfeitures. Under the Act, "indecent material" includes the visual or verbal depiction or description of human sexual or excretory organs or functions, including exposure of genitals, pubic area, buttocks, or the showing of any portion of the female breast below the top of the nipple. The depiction is prohibited if the "average person applying contemporary community standards for cable television . . . would find [it] is presented in a patently offensive way for the time, place, manner and context . . . ." *Id.* § 76-10-1702(4)(d).[1]

---

[1] The entire definition is as follows:

"(4) 'Indecent material' means a visual or verbal depiction, display, representation, dissemination, or verbal description of:

(a) A human sexual or excretory organ or function;

or

(b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully

On cross motions for summary judgment, the district court found for the plaintiffs. *Community Television of Utah, Inc.* v. *Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985). In its opinion the court focused on the federal preemption question raised by *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984), and by Congress' subsequent enactment of The Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780 (codified at 47 U.S.C. §§ 521-559). The district court found that federal law preempts state regulation of the content of cable television programming, except that under federal law cable operators may still be held liable by a state for violating "obscenity . . . or other similar laws." *Wilkinson*, 611 F. Supp. at 1103-04 (quoting 47 U.S.C. § 558). Finding that the Utah statute exceeded this limited power,[2] the district court held that the federal act preempted the Utah statute. *Wilkinson*, 611 F. Supp. at 1104, 1117. It also held that the Utah statute "is unconstitutionally overbroad and vague, and void on its face." *Id.* at 1117.

---

opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

(c) An ultimate sexual act, normal or perverted, actual or simulated; or

(d) Masturbation

which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented."

Utah Code Ann. § 76-10-1702(4).

[2] The statute would prohibit, for example, a "verbal description of . . . male . . . buttocks . . . which the average person . . . would find . . . patently offensive." *See supra*, note 1. The State of Utah admits that it intends to regulate matters that go beyond outright "obscenity."

The district court has written a comprehensive opinion with which we agree, and to which we can add little of value. We affirm its judgment on the basis of the reasons stated in the opinion.

We must, however, discuss one issue: the cable television companies' entitlement to attorney's fees under 42 U.S.C. § 1988. Defendant does not object to the district court's award of attorney's fees to the individual plaintiffs, but does challenge its award to the corporate plaintiffs. Defendant argues that 42 U.S.C. § 1988 was designed only to provide an incentive and means to secure counsel for those who could not otherwise afford to litigate for vindication of their civil rights. He alleges that the plaintiff corporations here are "deep pocket" litigants, who can afford to pay their own attorneys. He relies broadly on *Zarcone* v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979). *Zarcone* stated that a trial judge considering a § 1988 fee award should look to "whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without assurance that his attorneys' fees would be paid if he were successful." *Id.* at 1044.[3]

---

[3] *Zarcone* specifically established a "bright prospects" rule, denying attorneys' fees when the likelihood of success was sufficient to attract competent counsel on a contingent fee basis. 581 F.2d at 1044; *see also Buxton v. Patel*, 595 F.2d 1182, 1184 (9th Cir. 1979). In the instant case, in which declaratory and injunctive relief is sought, no contingent fee contract is feasible. The "bright prospects" rule is thus not relevant. Even if it were, this circuit previously has rejected the "bright prospects" rule. *See Cooper v. Singer*, 719 F.2d 1496, 1501 (10th Cir. 1983) (en banc); *J.&J. Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1473-74 (10th Cir. 1985).

The Second Circuit has narrowed the authority of *Zarcone*. *See Wheatley v. Ford*, 679 F.2d 1037, 1040 (2d Cir. 1982); *Milwe v. Cavuoto*, 653 F.2d 80, 82-83 (2d Cir. 1981). The Ninth Circuit has narrowed the authority of *Buxton*. *See Hamner v. Rios*, 769 F.2d 1404, 1407 (9th Cir. 1985).

The Supreme Court has declared that the prevailing party in a civil rights case "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *see also Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (reaffirming general rule). In *Love* v. *Mayor of Cheyenne*, 620 F.2d 235, 237 (10th Cir. 1980), we did reserve the issue of whether a plaintiff's ability to pay is a special circumstance that can render a fee award unjust. But our en banc opinion in *Cooper* v. *Singer*, 719 F.2d 1496 (10th Cir. 1983), answered that question. In *Cooper* we decided that the presence of a contingent fee contract would not limit the amount of a fee award in a civil rights case. *Id.* at 1507. En route to that holding, in addition to expressing disapproval of *Zarcone*, we specifically stated that § 1988 has purposes other than encouraging lawyers to take on a case, such as "penalizing obstructive litigation by civil rights defendants and generally deterring civil rights violations." *Id.* at 1501. These other purposes of § 1988 compel us to say that the ability of a party to bring a suit without a fee award is not a special circumstance rendering a fee award unjust. *Accord Duncan* v. *Poythress*, 777 F.2d 1508, 1511-14 (11th Cir. 1985) (en banc) (lawyer-litigant in civil rights case, representing self and thus arguably not needing § 1988 encouragement to bring suit, not a special circumstance, defeating fee award); *Ackerley Communications, Inc.* v. *City of Salem*, 752 F.2d 1394, 1397 (9th Cir.) (ability to pay for lawyer not a special circumstance), *cert. denied*, —— U.S. ——, 105 S. Ct. 3503 (1985); *Milwe* v. *Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981) (ability to pay not a special circumstance); *Ellwest Stereo Theater, Inc.* v. *Jackson*, 653 F.2d 954, 956 (5th Cir. 1981) (ability to pay not a special circumstance).

Defendant separately contends that his good faith belief in the constitutionality of his actions should shield

him from liability for attorneys' fees. But a defendant's good faith belief in the legality or constitutionality of its action has been rejected as a special circumstance warranty denial of attorney's fees. *J.&J. Anderson, Inc.* v. *Town of Erie*, 767 F.2d 1469, 1474 (10th Cir. 1985); *Love* v. *Mayor of Cheyenne*, 620 F.2d 235, 236 (10th Cir. 1980); *Espino* v. *Besteiro*, 708 F.2d 1002, 1005 (5th Cir. 1983); *see Hutto* v. *Finney*, 437 U.S. 678, 693 (1978).

The standard the district court applied in awarding fees was thus correct. Its actual fee award involved no abuse of discretion.

We therefore affirm the district court's award of attorney's fees, as well as its judgment on the merits.

AFFIRMED.

BALDOCK, Circuit Judge, specially concurring.

The per curiam opinion affirms the judgment on the basis of the district court's opinion. *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985). Although precedent compels me to agree that the Utah Cable Television Programming Decency Act (Cable Decency Act), Utah Code Ann. §§ 76-10-1701 to 76-10-1708 (1986 Supp.) is both vague and overbroad, I respectfully find that the Cable Decency Act does not withstand constitutional challenge on somewhat different and narrower grounds than the district court. I write separately because I do not agree with this court's apparent conclusion that federal law preempts state regulation of sexually oriented content which is not obscene. Per Curiam Opinion at 4 and n.2. Nor do I agree that the first amendment forecloses the regulation of indecency [1] on cable television, provided that the regulation

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[1] Before determining whether indecent material as defined in the Cable Decency Act, Utah Code Ann. § 76-10-1702(4) (see the Per Curiam Opinion at 3, n. 1), may be regulated, it is helpful to consider a narrower definition of indecency developed by the F.C.C. in *Pacifica Foundation*, 56 F.C.C.2d 94, 98 (1975), *on reconsideration*, 59 F.C.C.2d 892 (1976), *rev'd, Pacifica Foundation v. F.C.C.*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726, 732 (1978). The legislative history of the Cable Communications Policy Act of 1984 indicates that Congress was aware of the concept of indecency in the context of the *Pacifica* decision. H.R. Rep. No. 934, 98th Cong. 2d Sess. 69-70, *reprinted in*, 1984 U.S. Code Cong. & Ad. News 4655, 4706-4707 ("The Committee notes that the Supreme Court has held with respect to over-the-air that broadcasting speech which is not obscene, but nevertheless is 'indecent', may be subject to government-imposed time place and manner restrictions due to the unique prevasiveness [sic] of the over-the-air broadcast medium. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)."). The F.C.C.'s concept of indecency in *Pacifica* is carefully considered, is tailored to the nature of the audience receiving television or radio service and seems to balance the right of the government to protect the welfare of children while not substantially interfering with the viewing rights of adults. Thus, indecency may be defined as a description or depiction, which is patently offensive as measured

is a time, place and manner restriction that is narrowly drawn and exists for the protection of minors.

I. Preemption

The Utah Cable Decency Act is preempted partially by the Federal Cable Communications Policy Act of 1984, 98 Stat. 2779-2806, insofar as it applies to indecent programming on commercial (leased access) channels or public, educational or governmental (P.E.G.) channels. Cable operators [2] generally are required to set aside certain channels for commercial use by persons unaffiliated with the operator and also for public, educational or governmental use. *See* 47 U.S.C. §§ 531, 532. The cable operator is without editorial control over these channels. 47 U.S.C. §§ 531(e), 532(c)(2). But the Utah Cable Decency Act could be used to impose civil liability on cable operators for indecent programming on leased access or P.E.G. channels, notwithstanding that cable operators are without editorial control over programming appearing on these channels. This is because under the Utah Act a cable operator could be considered to have "distributed" indecent material, thereby creating a nuisance, even though the operator was without editorial

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by contemporary community standards for the broadcast medium, of sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience. *Pacifica Foundation*, 56 F.C.C.2d at 98. An important limitation on this concept is that a patently offensive description or depiction with literary, artistic, political or scientific value could be broadcast, preceded by warnings, during the late evening hours when the number of children in the audience was minimized. *Id.* at 98-100.

[2] A cable operator is "any person or group of persons (A) who provides cable service over a cable system and directly through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system." 47 U.S.C. § 522(4).

control over the indecent material.[3] The federal act expressly provides that cable operators shall not be held liable for the content of programs on leased access or P.E.G. channels. 47 U.S.C. § 558. In those instances where a state provision conflicts with a federal statute, the federal statute prevails. U.S. Const. art. VI, cl. 2; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947); *see also* H. Hart & H. Wechsler, The Federal Courts and the Federal System 435 (1953).

The cable operator is without specific editorial control of leased access channels so as to insure that cable systems will provide diverse programming. 47 U.S.C. §§ 521(4), 532(c)(2); H.R. Rep. No. 934, 98th Cong., 2d Sess. 47-52, *reprinted in*, U.S. Code Cong. & Ad. News 4684-4689. The franchising authority,[4] however, may

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[3] The Cable Decency Act proscribes the knowing distribution of indecent material as a continuing course of conduct:

> 76-10-1703. Distribution of indecent material as nuisance.
>
> A person shall be deemed to have maintained a nuisance when, as a continuing course of conduct, he knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming.

The statutory refinition of distribution under the Utah Act is very broad and includes the transmission and retransmission of cable signals, without regard to whether an operator maintained editorial control over programming.

> 76-10-1702. Definitions.
>
> (2) "Distribute" means to send, transmit, retransmit, telecast, disseminate, or cablecast by any means, including by wire or satellite, or to provide material to send, transmit, retransmit, telecast, disseminate, or cablecast.

Thus, to the extent that the Utah Act could be used to impose civil liability on a cable operator for indecent programming over which he has no editorial control, the Utah Act is preempted. 47 U.S.C. § 558.

[4] The franchising authority means "any governmental entity empowered by Federal, State or local law to grant a franchise." 47 U.S.C. § 522(9).

regulate program content insofar as such content is not protected by the Constitution. 47 U.S.C. § 532(h). Likewise, the cable operator is without editorial control of those cable channels designated for public, educational or governmental use, although a franchising authority and a cable operator may agree that certain cable services unprotected by the Constitution shall not be provided or shall be provided subject to conditions. 47 U.S.C. § 544(d)(1).

Cable operators retain editorial control over their remaining channels, so it is necessary to consider whether the Utah Cable Decency Act might apply to plaintiff cable operators based on programming carried on those channels. 47 U.S.C. § 558 provides:

> Criminal and civil liability
>
> Nothing in this subchapter [V-A] shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or *other similar laws*, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements. (Emphasis added.)

Section 558 preserves state and local power to regulate certain types of expression on regular cable channels. Determining whether the phrase "other similar laws" includes laws pertaining to indecency requires review of the legislative history of the provision. *In re George Rodman, Inc.*, 792 F.2d 125, 128 n.8 (10th Cir. 1986) (appropriate to consider legislative history when the purpose, intent or object of the statute is unclear from the language used therein).

The House Committee Report indicates that laws regulating indency would not be preempted should those laws conform to constitutional requirements.

> Section [558] that nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators with respect to Federal (including FCC regulations), state and local laws not inconsistent with this title relating to libel, slander, obscenity, incitement, false or misleading advertising or other similar areas of the law.
>
> . . .
>
> The Committee does not intend to affect liability which might result from other speech which may be held by the courts to be unentitled to constitutional protection (as discussed in relation to section [544(d)]).

H.R. Rep. No. 934, 98th Cong. 2d Sess. 95, *reprinted in*, 1984 U.S. Code Cong. & Ad. News, at 4732. The Committee discussion pertaining to § 544(d)[5] indicates that Congress was well aware of the uncertainty surrounding the regulation of indecency on cable television in the ab-

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[5] 47 U.S.C. § 544(d) provides:

> Cable service obscene, indecent or otherwise unprotected by Constitution
>
> (1) Nothing in this subchapter [V-4] shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or a renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States. 2(A) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operators shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.
>
> (B) Subparagraph (A) shall take effect 180 days after the effective date of this subchapter.

sence of a Supreme Court ruling on the constitutionality of such regulation.

> Subsection (d) addresses the issues of regulation of obscene programming services. The Committee is extremely concerned with the dissemination of programming containing explicit sexual material which might be offensive to many cable subscribers. The Committee is particularly concerned about the availability of such programming to child viewers. The Committee is also very mindful of the constraints the First Amendment imposes in terms of the permissibility of governmental regulation of program content.
>
> . . .
>
> The provision covers not only obscene speech, but other speech which may also be unprotected by the Constitution of the United States (such as "fighting words" and speech which presents a "clear and present danger" to public order). This provision would also permit changing constitutional interpretations to be incorporated into the standard set forth in [544](d)(1) should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable.

H.R. Rep. No. 934, 98th Cong. 2d Sess. 69, *reprinted in*, 1984 U.S. Code Cong. & Ad. News 4655, 4706. The Committee was aware that indecency had been regulated in the context of mid-afternoon over-the-air broadcasting in *F.C.C. v. Pacifica*, 438 U.S. 726 (1978), but that three lower federal court decisions had determined that an indecency standard could not be applied constitutionally to cable television, *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); *Cruz v. Ferre*, 571 F. Supp. 125 (S.D. Fla.

1983), *aff'd*, 755 F.2d 1415 (11th Cir. 1985). H.R. Rep. No. 98-934 at 70, *reprinted in*, 1984 U.S. Code Cong. & Ad. News at 4707.

The House Committee perceived a problem with the availability of obscene or indecent programming and discussed one alternative to restrict its availability to children.

> The Committee recognizes with respect to cable the need to provide for the restriction, within constitutionally permissible grounds, on the availability of programming, which might not be obscene, but is nonetheless indecent, if children are going to be adequately protected from exposure to such material. Thus, [544](d)(2)(A) provides one method for dealing with obscene or indecent programming by requiring every cable operator to provide to any subscriber upon request a device (often referred to as a "lock box") which is capable of restricting the viewing, during any period selected by the subscriber, of a cable service which contains obscene or indecent behavior.

Id. The Committee was of the view that "lock boxes" were one way to restrict the availability of obscene or indecent programming without affecting the first amendment rights of cable operators, programmers and viewers. There was no suggestion, however, that "lock boxes" were intended to be the only method for dealing with either obscenity or indecency.

Thus, the Utah Cable Decency Act insofar as it could apply to cable operators based on indecent programming on leased access or P.E.G. channels is preempted by federal law. This does not preclude the franchising authority, however, from exercising some control over constitutionally unprotected indecent programming on these channels. Whether the Utah Cable Decency Act may be used to regulate indecency in other situations (i.e. cable oper-

ators on regular channels and cable programmers on all channels) depends upon whether the Act is consistent with the first amendment. If the Utah Act violates the first amendment it is also preempted because § 558 only allows the states and localities to regulate speech which is unprotected by the Constitution.

II. First Amendment Considerations

It is now well settled that obscenity is not protected by the first amendment. *Roth v. United States*, 354 U.S. 476, 485 (1957). Material is obscene if the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest and depicts or describes, in a patently offensive way, specified sexual conduct and lacks serious literary, artistic, political or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973). That portion of the Utah Criminal Code pertaining generally to the dlistribution of pornographic material, i.e., Utah Code Ann. §§ 76-10-1201(11), 76-10-1203(1) & 76-10-1204 (1978 Rep. Vol)., encompasses that which is obscene under the *Miller* test. Although a more specific Utah statute purporting to regulate distribution of pornographic and indecent material on cable television, Utah Code Ann. § 76-10-1229 (1986 Supp.) was found unconstitutional in *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982), it appears that obscenity on cable television is within the purview of Utah's general statute criminalizing the distribution of pornographic material.

A fundamental issue raised by this appeal is whether sexually oriented material which is indecent is entitled to *unlimited* constitutional protection merely because it is not obscene. The district court resolved this question by holding that the *Miller* obscenity test is the outer limit of consent-based regulation of sexually oriented material on cable television. 611 F.Supp. 1107-1109. To be sure, the Supreme Court has recognized that the portrayal of

sex is not sufficient reason to deny material first amendment protection. *Roth v. United States*, 354 U.S. at 487. But the degree of protection may differ. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion) ("[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . ."). Both the content and context of speech must be considered in deciding the extent of first amendment protection. *F.C.C. v. Pacifica*, 438 U.S. at 755. But reasonable time, place and manner restrictions on sexually oriented material have been upheld in several cases, suggesting that regulation of indecent material for the protection of minors is not automatically barred by the first amendment.

In *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986), the Court upheld a city ordinance which prohibited adult theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park, or school. Although regulation based on content presumptively violates the first amendment, the ordinance was characterized as an allowable time, place and manner regulation which was content neutral because it was aimed not at the content of the films shown at such theaters, but rather at the secondary effects of such theaters on the surrounding community. *Renton*, 106 S.Ct. at 928-29. The city could look to evidence from other communities concerning the "adverse effects of the presence of adult motion picture theaters on neighborhood children and community improvement efforts," *Northend Cinema, Inc. v. City of Seattle*, 585 P.2d 1153, 1156 (Wash, 1978), *cert. denied*, 441 U.S. 946 (1979), and enact the ordinance to further the substantial governmental interest of preserving the quality of urban life. *Renton*, 106 S.Ct. at 930-31. The ordinance also met the

other requirement of a valid time, place and manner restraint: that there be reasonable alternative avenues of communication. Five percent of the land area of the city could be used for adult theaters and even though such land might not be commercially attractive, the ordinance did not have "the effect of suppressing, or greatly restricting access to, lawful speech." *Renton*, 106 S.Ct. at 932 (quoting *Young v. American Mini Theaters, Inc.*, 427 U.S. at 71 n. 35 (plurality opinion)).

In *New York v. Ferber*, 458 U.S. 747, 764 (1982), the Court upheld a New York statute prohibiting a person from knowingly promoting a sexual performance by a child under 16 by distributing material which depicts such performances. Significantly, the Court determined that the first amendment test for the regulation of child pornography differed from the obscenity standard in *Miller*; the work need be considered as a whole, need not appeal to the prurient interest of the average person, and need not be portrayed in a patently offensive manner. 458 U.S. at 764. The states are entitled to greater leeway in regulating child pornography for a number of reasons, one of which is that the *Miller* test for obscenity, with its requirements that the work be taken as a whole, that the sexual depiction appeal to the prurient interest and that the depiction be patently offensive, simply is ineffective in reducing the sexual exploitation and abuse of children which is "a government objective of surpassing importance." 458 U.S. at 757, 761.

The district court correctly pointed out that the Cable Decency Act does not conform to the *Miller* obscenity test because there is no requirement that a work taken as a whole appeal to the prurient interest and lack serious literary, aristic, political or scientific value. 611 F.Supp. at 1108. It also determined that the *Miller* requirement that the work depict or describe sexual conduct in a patently offensive way is missing in the Cable Decency Act. *Id.* Section 76-10-1702(4) defines indecent material

with reference to the following depictions or descriptions: (a) a human sexual or excretory organ or function, (b) a state of undress (nudity), (c) an ultimate sexual act, or (d) masturbation. There is also a requirement that such depictions or descriptions be patently offensive. Utah Code Ann. § 76-10-1702(4). I cannot agree that this list fails to satisfy the "patently offensive sexual conduct" element of the *Miller* test. In discussing this element, the Court declined to propose regulatory schemes for the States, but did give a few examples:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.
>
> Sex and nudiity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places (Footnote omitted.)

Miller v. California, 413 U.S. at 25. When the Utah statute is considered in light of the above, I think it does cover "patently offensive sexual conduct," which can include nudity. In any event, amicus Morality in Media suggests that the *Miller* test is inadequate to regulate sexually oriented material on cable television because of its requirement that the work be taken as a whole and that the work appeal to the prurient interest. When one considers the nature of television and the number of minors in the audience, it is apparent that there is highly objectionable sexually oriented material presented on cable television during family viewing hours notwithstanding that such material might not appeal to a minor's prurient interest (or could not because of young age) and might

not be obscene when taken as a whole. *See* Record Vol. III at 451.

The Court also has approved prohibiting a minor's access to sexually oriented magazines, even though those magazines were not obscene as to adults but were as to minors. *Ginsberg v. New York*, 390 U.S. 629 (1968). This has become known as the concept of variable obscenity. Minors have a more restricted right than adults to sexualy oriented material. It is permissible to determine what minors may view with reference to prevailing standards in the adult community with respect to what is suitable for minors. *Ginsberg*, 390 U.S. at 635. Implicit in a test relying on adult perceptions to determine whether material is suitable for minors is the recognition that most sexually oriented material is aimed primarily at sexually mature adults. *Ginsberg*, 390 U.S. at 635 n.4. Many states, including Utah,[6] have enacted statutes which

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[6] Utah Code Ann. § 76-10-1206 (1978 Rep. Vol.) provides in pertinent part:

> Dealing in harmful material to a minor.—(1) A person is guilty of dealing in harmful material when, knowing that a person is a minor, or having failed to exercise reasonable care in ascertaining the proper age of a minor, he:
>
> (a) Knowingly distributes or offers to distribute, exhibits or offers to exhibit, any harmful material to a minor; . . .

The definition of harmful to minors contained in Utah Code Ann. § 76-10-1201 (1978 Rep. Vol.) reflects the idea that what is not obscene as to adults may well be so as to minors:

> Definitions.—For the purpose of this part:
>
> (11) "Harmful to minors" means that quality of any description or representation, in whatsoever form, of nudity, sexual conduct, sexaul excitement, or sado-masochistic abuse when it:
>
> (i) Taken as a whole, appeals to the prurient interest in sex of minors;
>
> (ii) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (iii) Taken as a whole, does not have serious value for minors. Serious value includes only serious literary, artistic, political or scientific value for minors.

proscribe the distribution of material which is obscene as to minors.

Recently, two circuits have upheld ordinances which restrict not only the distribution to minors of sexually oriented material which is obscene as to them, but also the display of such material. The restricted material is not necessarily obscene as to adults, yet the restrictions were upheld. In *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983), we viewed such restrictions as time, place and manner regulations. The ordinance at issue allowed the display of sexually oriented material harmful to minors in display racks which concealed the lower two-thirds of the material from view. The court rejected the argument that the ordinance was overbroad because it restricted the access of adults and older minors to constitutionally protected publications:

> It is true that compliance with the ordinance will to some degree restrict the viewing by adults of materials which are, as to adults, constitutionally protected. However, the restriction is reasonable and does not offend the First Amendment.

721 F.2d at 1288. Although the ordinance was a content-based regulation, it did not suppress or greatly restrict access to protected speech and was "justified by the substantial governmental interest in protecting minors from exposure to harmful material." *Id.*

Similarly, the Eighth Circuit has considered an ordinance prohibiting the display of sexually oriented material harmful to minors unless the material is in a sealed wrapper. *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985). The challenged ordinance also required that any cover, which standing alone would be harmful to minors, must be blocked from view by an opaque cover if minors would be able to view it otherwise. Appellants argued that the sexually oriented material had to be considered as a whole

and that the ordinance was overbroad because that part regulating only the covers did not consider the material as a whole. The court of appeals rejected this argument and concluded that "the 'taken as a whole' requirement has no application outside the context of an attempt totally to suppress obscene material or criminally to prosecute someone for the dissemination of that material." 780 F.2d at 1393. Because adults still may review and purchase the material, the "taken as a whole" requirement was not applicable to the display regulations.

The eighth Circuit held that the ordinance was a reasonable time, place and manner regulation because it furthered significant governmental interests and allowed for reasonable alternative methods of communication. The ordinance sought to promote the well-being of youth and support parental authority within the household but did not prohibit adults from viewing and purchasing sexually oriented material. The court stated:

> Any burden here is the result of the permissible regulation of material that is obscene as to minors. The restriction in relation to adults is merely an incidental effect of the permissible regulation and is minimal in its impact. Adults are still free to request a copy of restricted material to view from a merchant or to peruse the material in adults only bookstores or in segregated sections of ordinary retail establishments. More significantly, adults are still able to view any of the material in a free and unfettered fashion by purchasing it. The continued availability of these materials to adults for purchase under the ordinance weighs strongly in favor of the ordinance's constitutionality.

780 F.2d at 1395. The Fourth Circuit in *American Booksellers Ass'n, Inc. v. Virginia*, 792 F.2d 1261, 1266 (4th Cir. 1986), appears to have reached the opposite conclusion in determining that alternative display methods for sexu-

ally oriented material would be ineffective or unduly burdensome on first amendment rights.

Thus, there is authority to suggest that the *Miller* adult obscenity standard is not the exclusive test to be applied to the regulation of sexually oriented material. Whether non-obscence sexually oriented material can be regulated in the cable television context depends in large part upon how cable television is characterized as a medium of expression. The Court has stressed that each medium of expression is unique insofar as first amendment analysis is concerned. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981); *Joseph Burtsyn, Inc. v. Wilson*, 343 U.S. 495, 502-03 (1952).

For several reasons, traditional broadcasting has received the most limited first amendment protection. *F.C.C. v. Pacifica*, 438. U.S. at 748. One reason for this is the physical scarcity of broadcast frequencies; government allocation and regulation of broadcast frequencies is necessary to serve the public interest. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 375-76, 396-400 (1969). In the past, a broadcast license has been described as a public trust because the broadcaster has been granted exclusive use of a frequency in the public domain. *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994, 1003 (D.C. Cir. 1966).

In *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 110 (1973), the Court described the congressional approach to regulation of private broadcasters under the Communications Act of 1934:

> From these provisions it seems clear that Congress intended to permit private broadcasting to develop with the widest journalistic freedom consistent with its public obligations. Only when the interests of the public are found to outweigh the private journalistic

interests of the broadcasters will government power be asserted withn the framework of the Act.

Traditional broadcasting has involved a balancing of the first amendment rights of private broadcasters with what is determined to constitute the public interest. Thus, in *Red Lion Broadcasting*, 395 U.S. at 377, the Court upheld the fairness doctrine which requires that a broadcaster give adequate and fair coverage to public issues, including opposing views. One who has been personally attacked on a broadcast must be offered a personal opportunity to respond, just as a candidate who has not been endorsed must be given reply time. *Id.* On the other hand, broadcasters are not required by the public interest standard or the first amendment to accept paid editorials. *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94 (1973). Although the first amendment rights of the broadcasters are important, the rights of the viewers and listeners are paramount. *C.B.S., Inc. v. F.C.C.*, 453 U.S. 367, 395 (1981).

Another reason advanced for the greater first amendment leeway in regulating broadcasting concerns the pervasiveness of this form of communication. In *F.C.C. v. Pacifica*, 438 U.S. at 748-49, 749 n. 27, Justice Stevens determined that the intrusive nature of broadcasting and its location in the home allows for greater regulation of patently offensive, indecent material than was allowable in *Cohen v. California*, 403 U.S. 15 (1971), where the appellant, in the hall of a public courthouse, wore a jacket with an offensively stated political message on the back. In his concurring opinion in *Pacifica*, Justice Powell also recognized "the interest of unwilling adults in not being assaulted by such offensive speech in their homes." 438 U.S. at 762. In public places, the offended viewer or listener may well need to turn away, but in the sanctuary of the home he may have more control. *F.C.C. v. Pacifica*, 438 U.S. at 749 n. 27; *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738 (1970).

Another reason that broadcasting has been subject to greater regulation consistent with the first amendment is its wide availability and accessibility to children. *F.C.C. v. Pacifica*, 438 U.S. at 749-50, 762. Thus, there is no unqualified right to broadcast obscene or indecent material. 18 U.S.C. § 1464. In the case of indecent material, so long as such material remains available to adults, perhaps at a different time or in another medium, the state may restrict the times when such material is broadcast. *F.C.C. v. Pacifica*, 438 U.S. 726, 750 n. 28 (plurality opinion) & 760 (Powell, J. concurring). The rationale behind such a restriction is not to defeat the rights of minors, but to protect them from their own improvidence and the acts of others. *See Ginsberg v. New York*, 390 U.S. at 649-50 (Stewart, J., concurring in result) (first amendment presupposes full capacity for individual choice not yet attained by minors). Such a restriction also enhances a parent's right to minmize a child's exposure to such material, while still retaining the benefits of broadcasting.

The degree of first amendment protection that will be accorded cable television has yet to be determined by the Supreme Court. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986), involved a first amendment challenge to the city's exclusive cable franchising process by auction. The respondent alleged that there was sufficient excess physical capacity to handle additional channels as well as the economic demand for an additional cable system. The Ninth Circuit reversed the district court's dismissal of the first amendment claim, holding that the city could not limit access to a single cable television company by use of an auction process when there was sufficient excess physical and economic capacity to handle another system. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985). The court of appeals determined that for first amendment purposes cable television was unlike

broadcasting, *see e.g. Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), because there was a lack of physical scarcity of cable channels. 754 F.2d at 1403-04. It also rejected an economic scarcity rationale to justify increased regulation by government relying on *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). The Supreme Court affirmed the court of appeals, but on narrower grounds. The Court declined to accept the appellate court's detailed characterization of cable television and its relationship to the first amendment in the absence of greater factual development at the trial court. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. at 2036. The Court, however, did make some general observations. Cable television operators plainly engage in first amendment activities not only by producing original programming, but also by exercising editorial discretion over programming. *Id.* at 2037. Just as broadcasters are entitled to first amendment protection, so too are cable operators. *Id.*

> Of course, the conclusion that respondent's factual allegations implicate protected speech does not end the inquiry. "Even protected speech is not equally permissible in all places and at all times." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. ——, ——, 105 S.Ct. 3439, 3448, 87 L.Ed. 2d 567 (1985) (slip op., at 10). Moreover, where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests. See, *e.g.*, *Members of the City Council v. Taxpayers for Vincent, supra*, 466 U.S., at 805-807, 104 S.Ct. 2129-2130; *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968).

City of Los Angeles v. Preferred Communications, Inc., 106 S.Ct. at 2037-38. Justice Blackmun's concurring opinion leaves little doubt about the importance of an

adequate factual basis for deciding the extent of first amendment protection associated with cable access.

> In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante*, at 5, the Court does not attempt to choose or justify any particular standard.

Id. at 2037 (Blackmun, J. concurring). Several federal courts have considered the issue, discussed below, with differing results.

In *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), we concluded that cable broadcasting is very different from newspaper publishing where very little government regulation is constitutionally permissible. We declined to apply *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, the Court declared unconstitutional a Florida statute requiring a newspaper to publish a candidate's reply to newspaper criticism and rejected an economic scarcity argument to justify such government regulation of the press. Cable television is distinguishable from a newspaper in that it is extensively regulated and is a natural economic monopoly which depends heavily upon use of the public domain. *Community Communications*, 660 F.2d at 1379. Thus, "government must have some authority in such a context to see to it that optimum use is made of the cable medium in the public interest." *Id.* The degree of authority depends upon the extent to which the cable operation is a natural monopoly, technological development and change, and finally, the uses and possible

uses of the medium. *Id.* Other courts have determined that cable television may be subjected to more regulation than non-broadcast media. *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127-28 (7th Cir. 1982); *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F.Supp. 976, 983-87 (D.R.I. 1983); *Hopkinsville Cable TV, Inc. v. Pennroyal Cablevision, Inc.* 562 F.Supp. 543, 547 (W.D. Ky. 1982).

Regulations involving the first amendment interests of cable operators and viewers are difficult to justify on a physical scarcity rationale given the tremendous channel capacity of a cable system. *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 44-46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). Moreover, at least three courts of appeals appear to have rejected the economic scarcity rationale as a justification for more extensive governmental regulation of cable television. *Id.* at 46; *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396, 1405 (9th Cir. 1985); *aff'd on other grounds*, 106 S.Ct. 2034 (1986); *see also Midwest Video Corp. v. F.C.C.*, 571 F. 2d 1025, 1055-56 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

The district court resolved the present case on cross motions for summary judgment. It relied on few facts because the statute was challenged as overbroad on its face. 611 F.Supp. at 1107. The destrict court considered the following undisputed facts concerning the nature of cable television service in Utah. I set these out because I think that facts pertaining to the nature of cable television are essential in deciding the degree of permissible content-based regulation.

> 9. A cable television system is a non-broadcast facility consisting of a system of privately-owned coaxial cables and associated signal generation, reception and control equipment that distributes television and other programming to subscribers.

10. Cable television service, such as that provided by [the cable operator plaintiffs], is legally available only on the premises of persons who choose to subscribe to this service and agree to establish and maintain a physical connection between their television receivers and a cable television system.

11. Television receivers that are not physically connected to a cable television system are not capable of receiving programming that is distributed solely over such a system.

12. The primary cable service offered to subscribers of [the cable operator plaintiffs] is called basic cable service. The basic cable service subscription price may include, depending on the particular system, retransmissions of the local television broadcast channels . . ., plus additional television broadcast channels imported by satellite to terrestrial transmissions from distant cities (KWGN-Denver, KTVU-Oakland, KTXL-Sacramento, WTBS-Atlanta, WGN-Chicago, and WOR-New York), plus special just-for-cable channels (ESPN, USA, CNN, SNC, MTV, NN, CBN, CHN, C-Span, and University of Utah ITV).

13. In addition to their basic cable service, [the cable operator plaintiffs] offer to provide programming such as that distributed by HBO (which includes recently released, feature length motion picture films, special entertainment programming and sports events) to those subscribers who choose to subscribe to this programming and to pay a monthly subscription fee in addition to the monthly fee paid for basic cable service.

14. HBO Service and pay television program services offered by companies other than HBO, including such services as Showtime, the Movie Channel and the Disney Channel, are provided by [the

cable operator plaintiffs] and other cable system operators.

15. Each pay television program service offered by [the cable operator plaintiffs] and other cable system operators is offered over a separate channel, and cable subscribers may choose to receive any or all of these program services.

16. [The cable operator plaintiffs] presently have about 60,000 subscribers in Utah.

17. Cable subscribers may obtain, either at no cost or at a cost not to exceed $20.00, a "lockbox" which is key operated and attaches to the television set. These lockboxes enable subscribers to render their sets incapable of receiving any particular channel.

Such devices, while available, are not widely utilized by subscribers.

Record vol. III at 384-86. Although this provides some information on the nature of cable television, the defendants suggested other relevant characteristics. However, the district court correctly determined that such information was not presented in accordance with Fed. R. Civ. P. 56 which requires that material supporting a motion for summary judgment be admissible evidence. 611 F. Supp. at 1107.

The defendants attempted to establish the following: (1) out of 84 million television households, 34 million now subscribe to cable with recent annual growth of 5 million households per year, (2) the cable systems operated by the plaintiffs are de facto monopolies because after each cable operator was granted its franchise, no second cable operator sought a competing cable franchise,[7] (3) that

[7] The district court rejected an economic scarcity rationale as a matter of law as a justification for content-based regulation like that applicable to broadcasting. 611 F.Supp. at 1112-1113. The

the cable operator plaintiffs use or cross public property in laying their cables and are subject to various local requirements, and (5) that less than one percent of the cable subscribers have purchased lockboxes. Record vol. III at 448-449 (¶¶ 25, 27 & 28). The plaintiffs objected to the relevance and materiality of all these contentions, although they did not object to the historical subscription information when considered as an approximation. Record vol. IV at 600-601. Plaintiffs also did not agree that cable systems are de facto monopolies. *Id* at 601.

The district court also did not consider information concerning the scanning practices of cable viewers, programming control exercisable by cable operators and the extent that movies shown on cable are rated. Record vol. III at 449-450. Again, such information did not meet the requirements of Fed. R. Civ. P. 56. The legal determination about the first amendment status of cable television depends somewhat upon an evidentiary basis. But even though the characteristics of cable television were not developed with great specificity at the district court, it seems that the extent of permissible regulation turns on a comparison of the cable medium with other media, particularly broadcasting.

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district court did not cite *Community Communications*, 660 F.2d 1370 (10th Cir. 1981) in its discussion, but rather relied on *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 44-45 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), which takes a different approach than the Tenth Circuit case. The district court concluded that because there was a lack of physical scarcity, market forces will determine available programming and licensing authorities need not regulate the content of the channels in the public interest provided the programming is protected by the Constitution. 611 F.Supp. at 1113. This says nothing about any economic barriers to entry which might call for regulation. Of course, whether indecent programming is entitled to unlimited constitutional protection still must be determined and that is the context in which the economic scarcity issue is relevant. Whether cable television in Utah constitutes a de facto monopoly was controverted by the parties.

Indecent broadcasting has been regulated. 18 U.S.C. § 1464. The extent of that regulation is better understood with reference to *F.C.C. v. Pacifica*, 438 U.S. 726, which, despite criticism, *see e.g.*, L. Tribe American Constitutional Law 61-68 (1979 Supp.), remains the leading Supreme Court precedent on the subject. In *Pacifica*, the Supreme Court considered whether the F.C.C. could regulate an indecent broadcast consistent with the first amendment. The F.C.C. had issued a declaratory order in response to a complaint against a New York radio station based on the broadcast of a monologue by comedian George Carlin entitled "Filthy Words." The monologue was broadcast about 2:00 p.m. on a Tuesday afternoon. Before the recorded monologue was broadcast, the host of the program warned that it included sensitive language that might offend some listeners, advising them to change stations and return in 15 minutes. *Pacifica Foundation*, 56 F.C.C.2d at 95-96.

A man accompanied by his young son heard the broadcast while driving and complained to the F.C.C. In its Memorandum Opinion and Order, the F.C.C. acknowledged that it is precluded from censorship, 47 U.S.C. § 326, but it and the Justice Department are required to enforce 18 U.S.C. § 1464 which prohibits broadcasing of "any obscene, indecent, or profane language." *Pacifica Foundation*, 56 F.C.C.2d at 96 ¶ 7. The F.C.C.'s declaratory order was not intended to interfere with the wide discretion of broadcasters in the programming area. *Id. citing Pacifica Foundation*, 36 F.C.C. 147 (1964) (provocative programming offensive to some listeners might be scheduled for late evening hours when number of children in audience minimized). The F.C.C. was of the view that indecency, as used in 18 U.S.C. § 1464, was not subsumed by the concept of obscenity, a view which necessarily prevailed at the Supreme Court. *Pacifica Foundation*, 56 F.C.C.2d at 97 ¶ 10; 438 U.S. at 744. Rather than totally restricting indecency, the F.C.C. analogized

to nuisance law in suggesting that it could be channeled into appropriate time periods. *Pacific Foundation*, 56 F.C.C.2d at 98 ¶ 11. The F.C.C. was concerned with the constitutional implications of even a limited restriction:

> In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting from what. As previously indicated, the most troublesome part of this problem has to do with the exposure of children to language which most parents regard as inappropriate for them to hear. This parental interest has "a high place in our society." See *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972), and cases cited therein. Therefore, the concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of day when there is a reasonable risk that children may be in the audience. (Footnote omitted.) Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.

Id. Indecency differs from obscenity in that indecency need not appeal to the prurient interest and, when the number of children in the audience has not been reduced to a minimum, it is not protected by a claim that it has literary, artistic, political or scientific value. *See id.* The F.C.C. recognized that during the late evening hours, when the number of children in the audience was minimized, its definition of indecency would remain the same, though such material might be protected if it were shown to have serious literary, artistic, political or scientific value. *Pacifica Foundation*, 56 F.C.C. at 98 ¶ 12.

Without question, the focus of the Supreme Court's review concerned the F.C.C.'s determination that the Carlin monologue was indecent as broadcast. *F.C.C. v. Pacifica*, 438 U.S. at 735. However, in reviewing that determination, it was essential for the Court to determine that the broadcast of indecent material could be restricted in appropriate circumstances consistent with the first amendment. *See id.* at 744, 745 n. 20 (plurality opinion) & 761 (Powell, J., concurring). This necessarily involved considering the degree of first amendment protection accorded material disseminated by broadcasting.

The F.C.C. gave four reasons for treating broadcasting differently for first amendment purposes than other types of expression which are less intrusive:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, see *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Pacifica Foundation, 56 F.C.C.2d at 97 ¶ 11, *quoted in*, *F.C.C. v. Pacifica*, 438 U.S. at 731 n. 2. The Court, in discussing why indecent broadcasting was subject to special treatment under the first amendment, emphasized the pervasive presence that the broadcast media have established in the lives of Americans and the unique accessibility of broadcasting to children. 438 U.S. 748-49. This rationale would seem equally applicable to cable television for several reasons, yet the district court declined to apply the *Pacifica* rationale based on what it perceived as the legal insignificance of the decision, 611 F.Supp. 1109-12, and the factual differences between broadcasting and

cable, *id.* at 1113-15. In my view, *Pacifica* is relevant to the regulation of indecency on cable television, but the Utah Cable Decency Act is not a valid time, place and manner restraint on indecency even under *Pacifica.*

There are several reasons which support the notion that cable television is similar to broadcasting for regulation of programming content consistent with the first amendment. Even though cable television is transmitted by cable and regular television is transmitted by broadcasting, there is an undeniable similarity between the two. Both rely on television receivers and provide a similar, and often interchangeable, product. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1986) (under Communications Act, F.C.C. had jurisdiction over cable television, an "impartant aspect of television service."); *United States v. Midwest Video Corp.*, 406 U.S. 649, 665 (1972). In *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 708-109, the Court determined that, like broadcast systems, cable systems could not be regulated as common carriers. To permit the regulation of indecency in radio and television broadcasting, but not on cablecasting, based merely on the differences in transmission, is to deemphasize that the programming transmitted on both emanates from outside the home and is received identically.

Just as radio and television are pervasive, so too is cable television with over 34 million, or approximately 40 percent of television households subscribing. Moreover, if past trends continue, the number of subscribers can be expected to increase. The pervasiveness of television simply is not related to how the signal reaches the set. Pervasiveness is related to the location of the television set in the home, the scanning activity of viewers, and other qualities of the television medium.

Much has been made of the fact that a television household must elect to have cable installed and then pay a

monthly fee for its use.[8] This distinction between traditional broadcasting and cablecasting, more than any other, has lead many including the district court to conclude that cable television "is not an intruder but an invitee whose invitation can be carefully circumscribed." 611 F.Supp. at 1113. Merely because cable television is a subscriber medium does not mean that it is so unlike traditional broadcasting that indecency cannot be regulated. It is helpful to review those elements that distinguish traditional broadcasting from other media when determining whether cable television is pervasive. In *WUHY-FM*, the F.C.C. said:

> *And here it is crucial to bear in mind the difference between radio and other media.* Unlike a book which requires the deliberate act of purchasing and reading (or a motion picture where admission to a public exhibition must be actively sought), broadcasting is disseminated generally to the public . . . under circumstances where reception requires no activity of this nature. Thus, it comes directly into the home and frequently without any advance warning of its content. Millions daily turn the dial from station to station. While particular stations or programs are oriented to specific audiences, the fact is by its very nature, thousands of others not within the "intended" audience may also see or hear portions of the broadcast. (Footnote omitted.) Further, in that audience are very large numbers of children. (Footnote omitted.)

24 F.C.C.2d 408, 411 (1970). When further analyzed, it is apparent that merely subscribing to cable does not alter its basic nature. A subscription to cable presumably

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[8] Although broadcast television is not a subscriber medium, a decision to obtain a television set is a prerequisite to viewing. Moreover, broadcast television is supported, at least indirectly, by viewers who purchase the products advertised.

is purchased to enhance the viewers' choice of programs. It is easy to get a general idea of the contents of a book or magazine, but with television it may be more difficult because of the tremendous diversity of programming, the large number of programs and the scanning which occurs. This is particularly true when indecent programming is interspersed with programming generally thought suitable for minors.

Practically, cable television reception does not require activity of a purchasing nature for each program. The cable viewer is not purchasing a particular program at the time of viewing, but rather he is purchasing a wider range of programs than available on broadcast television. He is purchasing program choice. Cable programs are then disseminated generally to the public, and like programs on conventional television or radio, are frequently viewed or heard in the home where the right to be free of "patently offensive indecent material" outweighs an unlimited right to present such material. *F.C.C. v. Pacifica*, 438 U.S. at 748.

Not only does cable television come directly into the home, it frequently is viewed without any effective advance warning of patently offensive, indecent material. This is true for several reasons. Out of the hundreds of programs offered on cable television, it is unreasonable to shift an affirmative duty onto every parent to study all cable television program listings each week, even assuming that such listings provide adequate warning. No such duty was even considered by the Court in *Pacifica*. While it is true that lockboxes may be used to prevent reception of entire channels, the unwanted complexity that these devices introduce into television viewing is attested to by their lack of use. Most importantly, there is no reason to believe that frequent scanning, often a factor in the regulation of broadcasting, does not occur with cablecasting. This means that viewing often will be unplanned and incomplete. Viewers will tune into scenes

of programs in progress, reducing the effectiveness of warnings preceding such programs. *See id.*

Over and over the argument has been made that a subscriber voluntarily chooses cable television service and should not be heard to complain if some of the programming is indecent because the service may be canceled. Stated another way, the subscriber consents to the indecency for himself and his household. This argument is too simplistic and is akin to the notion that one who hears an indecent broadcast has an adequate remedy by turning it off. This notion was expressly rejected in *F.C.C. v. Pacifica*, 438 U.S. at 748-49. The record indicates that the basic cable service and the optional services provide plenty of programming without patently offensive indecent material. As a developing medium, cable television provides a remarkable opportunity for viewing programming in other distant cities, recent movies, sports and other features for a nominal fee. That opportunity should be available to all who are willing to subscribe, even those who object to patently offensive indecent material being presented during family viewing hours. Quite simply, in enacting the Cable Decency Act, the Utah legislature seems to have wanted to take the good (increased choice) without the bad (indecent material) .

The intent statement of the Cable Decency Act indicates that the Utah legislature was concerned that children have access to cable television and their viewing is largely unsupervised. As discussed previously, the state may restrict access to sexually oriented material which is not obscene provided there is not an outright ban. This is to protect both the state's interest in the well-being of children, *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944), and the right of parents to direct the upbringing of their children, *Ginsberg v. New York*, 390 U.S. 629, 639 (1978). Admittedly, some parents may have no objection to their children viewing what by contemporary community standards is patently offensive and indecent.

That alone does not preclude the state from channeling the indecency to a later time period. It does not matter that some children still may have access to indecent programming when fewer children are in the audience, for an appropriate regulatory act may protect many households. *Pacifica Foundation v. F.C.C.*, 556 F.2d at 34 (D.C. Cir. 1977) (Leventhal, J., dissenting).

Thus, I find that the *Pacifica* rationale for the regulation of indecency applies to cablecasting. *Contra Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985). Although it has been suggested that *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74 (1983), limits *Pacifica*, that interpretation is unpersuasive. In *Bolger*, the Court held that a federal statute totally banning the mailing of unsolicited advertisements for contraceptives was contrary to the first amendment. The government sought to justify the total prohibition based on the interests furthered by the statute: protecting recipients from offensive material and protecting the right of parents to guide their children concerning contraception. The Court determined that the former was entitled to little weight and that the latter was furthered too minimally to justify a total prohibition. *Bolger*, 463 U.S. at 73. The Court was satisfied that parents exercise substantial control over the distribution of mail received at home and that the restrictions on this type of mail allowed parents to control and eliminate its receipt. *Id.* at 64 n. 5 & 73.

The Court discussed *Pacifica* indicating it was a narrow holding which applied to broadcasting based on the unique pervasiveness of broadcasting and its unique accessibility to children. *Id.* at 74. Because I find that these same two characteristics are inherent in cablecasting, I cannot read *Bolger* as limiting *Pacifica*'s application to this case. Moreover, *Bolger* is factually distinguishable. The receipt and distribution of printed advertising concerning contraceptives is easily and effectively controlled by parents. The reception of cable television is not.

It must be remembered, however, that *Pacifica* principally concerns the regulation of indecency as applied to a specific factual context. In *Pacifica*, Justice Stevens remarked that "indecency is largely a function of context—it cannot be adequately judged in the abstract." 438 U.S. at 742; *see also id.* at 750. Nonetheless, the case before the court involves a challenge to the Utah Cable Decency Act on its face. Invalidation of legislative enactments without the benefit of facts concerning application is "manifestly, strong medicine" which "has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The purpose of such invalidation is to protect the exercise and potential exercise of constitutionally protected expression. "[T]he overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615. Stated another way, the statute must reach "a substantial number of impermissible applications." *New York v. Ferber*, 458 U.S. 747, 771 (1982).

Even if *Pacifica* is read to allow regulation of indecency on cable television, the Utah Cable Decency Act is not acceptable because it is complete prohibition rather than regulation. In other words, indecency may be regulated with an acceptable time, place and manner regulation. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Although the Utah legislature has identified a substantial governmental interest in the protection of minors, it has not provided for reasonable alternative times for the dissemination of indecent material. A thoughful opinion by the Utah Attorney General makes a pervasive case that the legislature did not intend a total ban on indecency. The statute does not adequately reflect that intention, however, and a federal court cannot rewrite the statute. *See* Utah Op. Att'y Gen. No. 83-001.

The statute is also void for vagueness. Defining indecency with express reference to "the time, place, man-

ner and context in which the material is presented," Utah Code Ann. § 76-10-1702(4), without more, would cause people of common intelligence to guess at the meaning of indecency and differ as to the law's application. *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). This uncertain meaning does not provide fair notice of what is proscribed, could result in arbitrary enforcement and could deter protected expression. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). For these reasons, I am compelled to agree with the result reached by the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
D. UTAH, C.D.

Nos. C 83-0551A, C 83-0581A

COMMUNITY TELEVISION OF UTAH, INC., COMMUNITY CABLE OF UTAH, INC., UTAH SATELLITE, INC., WASATCH COMMUNITY T.V., INC.,

and

CONNIE R. JONES, LYNN F. JONES, CAROLINE A. SNOW, RALPH MCCLEARY, KAY ULRICH, ED ULRICH, WAYNE WILLIAMS, as individuals and as representatives of a class of persons similarly situated,

and

HOME BOX OFFICE, INC.,

Plaintiffs,

v.

HON. DAVID L. WILKINSON, Attorney General of the State of Utah, individually and in his official capacity and as a representative of the class of all persons empowered to enforce the Cable Television Programming Decency Act,

Defendants.

April 10, 1985

Bryan L. McDougal, Robert D. Sherlock, Patricia A. Rorke, and Steven H. Blum, Salt Lake City, Utah, for plaintiffs.

Donald B. Holbrook and LeGrand R. Curtis, Salt Lake City, Utah, and George H. Shapiro and James P. Mercurio, Washington, D.C., for plaintiff-intervenor Home Box Office, Inc.

Robert N. Parrish, Asst. Atty. Gen., State of Utah, Salt Lake City, Utah, and Charles A. Hobbs and Jerry R. Goldstein, Washington, D.C., for defendants.

The court accepted amicus briefs from Morality in Media, Inc., the Nat. Cable Television Ass'n, Inc., the F.C.C. and Citizens for Positive Community Values.

ALDON J. ANDERSON, Senior District Judge.

INTRODUCTION

On April 20, 1983, the Utah State Legislature passed the Cable Television Programming Decency Act ("Cable Decency Act"). Utah Code Ann. §§ 76-10-1701 to -1708 (Supp.1983). The Act gives certain state officials authority to bring nuisance actions against anyone who continuously and "knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming." *Id.* § 76-10-1703. The Act defines "indecent material" as follows:

> a visual or verbal depiction, display, representation, dissemination, or verbal description of:
>
> (a) A human sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or
>
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation
>
> which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place,

manner and context in which the material is presented.

Id. § 76-10-1702(4).

On April 21, 1983, the plaintiffs Community Television of Utah, Inc., Community Cable of Utah, Inc., Utah Satellite, Inc., and Wasatch Community TV, Inc. filed this action. Claiming that the Act infringes upon their first amendment rights, these cable operator plaintiffs sought declaratory and injunctive relief. They named Attorney General David L. Wilkinson as defendant in his individual and official capacities and as a representative of the class of state officials empowered to enforce the Act. Because the plaintiffs raised important constitutional issues, the Attorney General agreed not to enforce the Act pending resolution of this case.

The court consolidated the original action with a separate action brought by several cable TV subscribers and allowed Home Box Office, Inc. to intervene as a plaintiff. The court also accepted *amicus* briefs from Morality in Media, Inc. and the National Cable Television Association, Inc. All plaintiffs moved jointly for summary judgment. The defendants opposed the plaintiffs' motion and filed a cross motion for summary judgment. The court heard oral argument on May 25, 1984 and took both motions under advisement.

As this court prepared to rule on the summary judgment motions, the United States Supreme Court handed down its decision in *Capital Cities Cable, Inc. v. Crisp*, —— U.S. ——, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). That case involved the scope of the states' power to regulate cable TV. The parties were asked to submit briefs explaining how *Capital Cities* might affect the decision in this case. The court accepted *amicus* briefs on the same issue from the Federal Communications Commission, Morality in Media, Inc. and Citizens for Positive Community Values. On August 10, 1984, the court heard

oral argument on the issues of federal pre-emption raised by the *Capital Cities* case.

After carefully considering both the pre-emption and first amendment issues, the court prepared to rule on the motions. In October 1984, Congress passed the Cable Communications Policy Act ("Policy Act"), a statute which changed the regulatory structure of the cable television industry. The court requested both sides to submit briefs explaining how the new law would affect the pre-emption issue. On November 13, 1984, the parties completed this briefing. Being fully advised, the court now enters this Memorandum and Order for Summary Judgment.

I. FEDERAL PRE-EMPTION

A. *The Capital Cities Case*

In *Capital Cities Cable, Inc. v. Crisp*, the U.S. Supreme Court considered whether Oklahoma could prevent cable television operators from retransmitting alcoholic beverage advertisements originally transmitted from other states. In a unanimous opinion the Supreme Court held that federal law pre-empted the Oklahoma ban. The Court found that the FCC had expressly pre-empted state regulation of the "operational aspects" of cable television. The FCC's exclusive power included authority to regulate the selection of signals cable operators may carry. In turn, the FCC gave state and local authorities responsibility to regulate various local incidents of cable operations. This local power included authority to grant franchises, delineate franchise areas, regulate the construction of cable facilities and maintain rights of way. 104 S.Ct. at 2702.

To support its conclusion, the Court invoked that branch of the pre-emption doctrine that rests on congressional intent. Pre-emption is effective "when Congress, in enacting a federal statute, has expressed a clear intent to pre-empt state law." *Id.* at 2700 (*citing Jones v. Rath*

Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). The Court noted that federal regulations pre-empt state law as effectively as federal statutes if the agency decision to pre-empt " 'represents a reasonable accommodation of conflicting policies' that are within the agency's domain." 104 S.Ct. at 2701 (quoting *United States v. Shimer*, 367 U.S. 374, 383, 81 S.Ct. 1554, 1560, 6 L.Ed.2d 908 (1961)). The Court found that the agency's intent was clear: "[o]ver the past twenty years, pursuant to its delegated authority under the Communications Act, the FCC has unambiguously expressed its intent to pre-empt any state or local regulation of [the] entire array of signals carried by cable television systems." 104 S.Ct. at 2701. This intent to pre-empt extended to power over both non-broadcast signals (commonly described as "pay cable") and retransmitted broadcast signals. *Id.* at 2702.

The Court also explained the reasoning supporting the Commission's pre-emption decision. The Commission values diverse programming, and it has tried to give households access to television services presently unavailable from local broadcasts. State and local regulation of program offerings would interfere with this federal regulatory scheme:

> Consistent with its congressionally defined charter to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide and world-wide wire and radio communication service . . . ," 47 U.S.C. § 151, the FCC has sought to ensure that "the benefits of cable communications become a reality on a nationwide basis." *Report and Order*, 54 F.C.C.2d, at 856. With that end in mind, the Commission has determined that only federal pre-emption of state and local regulation can assure cable systems the breathing space necessary to expand vigorously and provide a diverse range of program offerings to potential cable subscribers in all

> parts of the country. While that judgment may not enjoy universal support, it plainly represents a reasonable accommodation of the competing policies committed to the FCC's care and we see no reason to disturb the agency's judgment. And, as we have repeatedly explained, when federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, "States are not permitted to use their police power to enact such a regulation." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 [98 S.Ct. 988, 1004, 55 L.Ed.2d 179] (1978); [other citations omitted].

Id. at 2705.

In *Capital Cities*, the Supreme Court did not explicitly consider whether state indecency regulations were pre-empted; the Court discussed program regulation in general. In their original pre-emption briefs, the plaintiffs relied on the Supreme Court's sweeping language and concluded that the FCC had pre-empted state indecency regulations. The defendants disagreed, arguing that indecency is a special area appropriately reserved for state regulation.

When Congress passed the new Policy Act, this question of FCC intent became moot. Before Congress enacted this statute, the courts had to rely upon FCC pronouncements to determine the scope of pre-emption. Better authority is now available. In the Policy Act, Congress precisely delineated the spheres of state and federal authority over cable television programming. Courts can now refer to congressional directives to determine whether state laws are pre-empted. The court therefore turns to the Policy Act to resolve the pre-emption issue.

B. *The Cable Communications Policy Act of 1984*

The Cable Communications Policy Act of 1984 is the first federal statute to establish a comprehensive regu-

latory scheme for the cable industry. The provisions of the Policy Act relevant to this case concern the allocation of federal, state and local regulatory power. In the Policy Act, Congress refined the general presumption, announced in *Capital Cities*, that states have no power to regulate program content. In the section of the Policy Act entitled "Coordination of Federal, State and Local Authority" it states that any state or local act or regulation which is inconsistent with the provisions of the Policy Act is pre-empted and superseded. Cable Communications Policy Act § 636(c). The Policy Act retains exclusive federal regulatory power over program content in all but a few limited areas. The Act describes these areas explicitly:

> Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.

Id. § 624(f)(1).

To resolve the pre-emption issue, the court must determine whether the Policy Act "expressly provided" for the type of regulation enacted by the Utah Legislature.

1. *State Power to Regulate Programs Carried on "Special Access" Channels*

The Policy Act insures that certain parties unaffiliated with the cable operator will have access to the cable television medium. Under the terms of the Policy Act, cable operators must set aside a limited number of channels for independent commercial, public, educational or governmental programs. The Policy Act expressly delineates the scope of state power to regulate program content on these "special access" channels. To begin its pre-emption analysis, the court turns to the question whether the Policy Act permits regulation of these special channels through the mechanism provided in the Utah law.

Section 612 of the Policy Act establishes commercial access channels. It requires that cable operators designate a certain number of channels for commercial use by persons unaffiliated with the operator. *Id.* § 612(b). These special channels are set aside to insure that cable systems carry information from a wide variety of sources. *Id.* 612(a). To enhance the variety of programs available to the public, § 612 prohibits cable operators from editing programs carried on these channels. *Id.* § 612(c)(2).

Section 612(h) does allow state franchising authorities, in determining whether a cable service shall be provided, to consider these factors:

> Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States.

Id. § 612(h).

Assuming *arguendo* that § 612(h) is constitutionally valid, it does not authorize the restrictions in the Utah Decency Act. The power preserved by § 612(h) is too limited for two reasons. First, § 612 only applies to a limited number of commercial channels which have special editorial restrictions. Utah's Cable Decency Act covers significant areas of cable program distribution outside the scope of § 612. Utah Code Ann. § 76-10-1702(2) (Supp.1983).

Second, the Policy Act disallows the type of regulation provided in the Utah law. Because cable operators cannot edit the programs carried on the special channels discussed above, the Policy Act forbids civil actions against the cable operators concerning the content of those programs. *See* Policy Act § 638. Section 612(h) of the Policy Act authorizes a different form of regulation. It provides

that, as to any commercial channels provided under this section, a cable service shall not be provided, or shall be provided subject to conditions, if the cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the United States Constitution. Section 612 therefore expressly pre-empts, rather than authorizes, the Utah law with regard to these channels.

A similar analysis applies to the special public, educational or governmental channels discussed under § 611 of the Policy Act. Under § 611, franchising authorities may require operators to designate a certain number of channels for public, educational or governmental use. *Id.* § 611 (b). Cable operators may not edit the programs carried on these channels. *Id.* § 611(b). Like the special commercial channels discussed above, these channels enhance the variety of information received by the public. The regulatory scheme governing these channels parallels the scheme under § 612. The Policy Act forbids civil actions against cable operators concerning the content of programs on these channels. *See Id.* § 638. State authorities may regulate program content only through the franchise renewal process. *See Id.* § 624(d)(1). The Policy Act therefore expressly pre-empts the Utah law with regard to the channels designated under § 611.

2. *State Power to Regulate Programs Carried on All Other Channels*

Section 638 of the Policy Act delineates the scope of state power to regulate programs carried on all other channels. It is therefore the last section of the Policy Act that might arguably authorize the enforcement of the Utah law. Section 638 preserves certain federal, state and local government powers to regulate the content of cable television programs:

> Nothing in this title shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use [under § 611] or on any other channel obtained under section 612 or under similar arrangements.

Id. § 638.

Hense, § 638 explicitly preserves state power to regulate obscenity. As both sides of this case agree, Utah's Cable Decency Act extends beyond "obscene" materials to regulate those termed "indecent." "Indecency" and "obscenity" are legal terms of art which have different definitions and different constitutional implications. *See infra* Part II of this opinion. The obscenity provision of § 638 therefore does not, by its terms, allow enforcement of Utah's Cable Decency Act, which regulates "indecency." The question here is whether the Cable Decency Act is one of the "other similar laws" which § 638 permits states to enact and enforce.

The list in § 638 is a classic collection of laws regulating expression which the Supreme Court has deemed unprotected by the first amendment. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (libel and slander); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (incitement); *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967) (invasion of privacy); *Virginia Pharmacy Board v. Virginia Consumer Counsel*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (false or misleading advertising). The plain purpose of § 638 is to preserve federal, state

and local regulation of unprotected expression in the areas noted.

Upon examination, Utah's Cable Decency Act does not appear to fit within § 638 because "indecent" expression is not wholly unprotected speech. The very distinction between obscenity and indecency rests to a great extent upon the different levels of constitutional protection extended to both classes of expression. Indecency, which has been found subject to limited regulation under extremely limited circumstances, *see* Part II of this opinion, is conspicuously absent from the list of wholly unprotected expression contained in § 638.

Oother sections of the Policy Act address indecency explicitly. These provisions make it evident that § 638 does not cover laws regulating indecency. Section 624(d)(2)(A) requires cable operators to provide lock boxes at the request of subscribers who wish to "restrict the viewing of programming which is obscene or indecent." Policy Act § 624(d)(2)(A). With a lock box a subscriber can control the particular programs viewed on his television set. As the court notes above, § 612(h) addresses indecency in a different context. These explicit indecency provisions strongly imply that Congress deliberately omitted indecency from the list in § 638. It is unlikely that Congress would accidentally omit indecency from § 638, which defines important areas of federal, state and local power, and remember to include indecency in other sections of the Act.

The legislative history of the Policy Act supports the conclusion that § 638 does not cover the Cable Decency Act. According to the House Committee Report, § 638 preserves state power to regulate "speech which may be held by the courts to be unentitled to constitutional protection (as discussed in relation to section 624(d))." H.R.Rep. No. 934, 98th Cong., 2d Sess. 95 (1984), U.S. Code Cong. & Admin.News 1984, pp. 4655, 4732. In

discussing § 624(d), the Report makes a clear distinction between indecency and "unprotected expression." The Report notes that although the Supreme Court has validated limited restrictions on indecency in the broadcast medium, courts have always found indecent expression protected in the cable television medium. Section 638 would only cover indecency if future court rulings held that indecency regulations are constitutionally valid as applied to cable:

> The provision covers not only obscene speech, but other speech which may also be unprotected by the Constitution of the United States (such as "fighting words" and speech which presents a "clear and present danger" to the public order). This provision would also permit changing constitutional interpretations to be incorporated into the standard set forth in 624(d)(1), *should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable.*
>
> The Committee notes that the Supreme Court has held with respect to over-the-air that broadcasting speech which is not obscene, but nevertheless is "indecent", may be subject to government-imposed time, place and manner restrictions due to the unique pervasiveness of the over-the-air broadcast medium. *FCC v. Pacifica Foundation*, 438 U.S. 726 [98 S.Ct. 3026, 57 L.Ed.2d 1073] (1978). The Committee does not intend to disturb the applicability of such restrictions with respect to that medium.
>
> The Committee further notes that Federal courts have held when reviewing the facts under particular state statutes that an indecency standard may not be constitutionally applied to cable television. *Community Television of Utah v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982); *Home Box Office Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982); *Cruz v. Ferre*, 571 F.Supp. 125 (S.D.Fla.1983).

H.R.Rep. No. 934, 98th Cong., at 69-70, U.S.Code Cong. & Admin.News 1984, pp. 4706-4707 (emphasis added). *See also* Part II of this opinion.

The defendants cite the remarks of Senator Goldwater and Representative Nielson for the proposition that Congress intended § 638 to cover indecency. Senator Goldwater and Representative Nielson disagree with the official House Report, claiming that indecency laws are "other similar laws" covered by § 638. 130 Cong.Rec. S14289 (daily ed. Oct. 11, 1984); affidavit of Howard C. Nielson. It is not certain from the circumstances that these men understood the clear legal distinction between obscenity and indecency when they made these comments. The Senator and the Congressman seem to characterize indecency as unprotected expression by stating that § 638 preserves state power to regulate it. *Id.* Yet as the analysis above indicates, indecency is not unprotected expression under existing precedent.

The court also notes that Senator Goldwater's comments were inserted in the Congressional Record rather than spoken in the Senate. *See* 130 Cong.Rec. S14289 (daily ed. Oct. 11, 1984); 124 Cong.Rec. 3676 (1978) (all unspoken prepared statements submitted for printing in the Record are preceded by a "bullet" symbol). In addition, some of Representative Nielson's remarks concerned a bill which Congress never enacted. *See* 130 Cong.Rec. H9342 (daily ed. Sept. 11, 1984). Other remarks concerned the final bill but missed being officially transcribed. *See* affidavit of Howard C. Nielson. Under the circumstances, and in view of the clear statutory pattern, the official House Report is a more reliable indicator of congressional intent than the sincere and thoughtful comments of these respected congressmen. Taken as a whole, the legislative history shows that § 638 does not preserve state power to regulate indecency.

In summary, the Policy Act links power with principle. The Policy Act preserves state power to regulate program

content that the first amendment does not protect. If state regulations are unconstitutional, they are also pre-empted under the terms of the Policy Act. The final resolution of the pre-emption question necessarily requires a ruling on the first amendment issue. The court therefore proceeds to analyze the constitutionality of the Cable Decency Act.

II. FIRST AMENDMENT CONSIDERATIONS

A. *The Overbreadth Doctrine*

The free speech clause of the first amendment to the Constitution of the United States provides "the indispensable condition of nearly every other form of freedom": [1] "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[2] The United States Supreme Court has the responsibility of defining the scope of this clause. Therefore, this court must be guided by Supreme Court precedent in resolving the issues presented.

The plaintiffs allege that Utah's Cable Decency Act violates the first amendment. They challenge the Cable Decency Act on its face, claiming that it is overbroad. In a democratic society which relies upon elected officials for most policy decision, it is "strong medicine" for a court to invalidate a statute on its face. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (973). It is therefore important for the court to explain the general circumstances under which facial invalidation for overbreadth is appropriate.

A law is overbroad "if it 'does not aim specifically at evils within the allowable area of (government) control,

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[1] *Palko v. Connecticut*, 302 U.S. 319, 327, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937).

[2] This prohibition has been extended to the states through the 14th amendment. *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 259, 81 L.Ed. 278 (1937).

but . . . sweeps within its ambit other activities that constitute an exercise' of protected expressive or associational rights." L. Tribe, American Constitutional Law § 12-24, at 710 (1978) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940)). An overbroad law is void on its face; it need not be challenged "as applied" to the particular facts of a case. *Id.*

Overbroad laws, for which facial invalidation is appropriate, have two characteristics. First, the overbreadth is substantial; protected activity must be a significant part of the law's "target." *Id.* at 711. The literal scope of many laws encompasses some protected expression. Yet unless the "target area" of these laws contains significant protected expression, they are not overbroad; they can only be challenged "as applied" to particular cases. *Id.*

Second, the unconstitutional applications of an overbroad law cannot be satisfactorily exercised. *Id.* If a court can adopt a limiting construction which will omit unconstitutional applications, the law is not overbroad. In addition, a law is not overbroad if its constitutionally infirm sections may be struck down without "rewriting" it. *Id.* at 714, 717.

Facial invalidation is the appropriate cure for the "chilling effect" created by overbroad laws. By definition, an overbroad law addresses significant protected expression; protected activity is therefore deterred within the law's "target area." This deterrence injures first amendment rights even if a well intentioned prosecutor enforces the law only against unprotected activity. *See* Note, "The First Amendment Overbreadth Doctrine," 83 Harv.L. Rev. 853 (1970).

If Utah's Cable Decency Act is overbroad, facial invalidation is therefore the appropriate remedy. This is true even though it may be difficult for courts to judge

whetre particular materials are indecent without a factual context. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 742, 98 S.Ct. 3026, 3036, 57 L.Ed.2d 1073 (1978). The question whether particular materials are indecent is not before the court in this case.[3] Regardless of the particular applications of the law, the court may strike it down on its face if its "target area" is too broad; a division of this court has already used this remedy twice to invalidate overbroad cable TV laws. *See Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987 (D.Utah 1982); *Community Television of Utah, Inc. v. Roy City*, 555 F.Supp. 1164 (D.Utah 1982).

With the foregoing guidelines in mind, the court must now proceed to determine whether the Utah law is overbroad and void on its face.

B. *The Facts*

Few facts are relevant to a facial challenge, because the law at issue is not analyzed in a factual context. The defendants acknowledged that the only evidence material to a facial challenge concerns the Decency Act itself, its legislative history and the Attorney General's Opinion regarding it. Defendants' Response to Plaintiffs' Motion to Strike at 5 n. 4 (filed Nov. 16, 1983). The plaintiffs agree that the material facts in this case are extremely limited. *See* Memorandum of Plaintiffs in Support of Their Motion to Strike (filed Nov. 7, 1983). From the memoranda presented in this case, the court believes that there is no genuine issue of material fact concerning the

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[3] The defendants urge the court to view numerous examples of the type of material they represent is being broadcast over cable television. This is unneecssary for two reasons. First, the plaintiffs seek a declaratory judgment holding that the law is vague and overbroad. The court's holding obviates any need to determine whether each proffered example is indecent under the statute. Second, defendants have undertaken no enforcement action and therefore it is unnecessary to view examples of what the defendants characterize as indecent.

question whether the Decency Act is facially unconstitutional.

In their amended filings, the parties have presented 37 paragraphs of factual allegations, including objections made. These amended filings effectively superseded prior statements of fact and mooted the motion to strike filed on November 7, 1983.

Some of these pargraphs contain facts that are immaterial to the question of facial validity. Paragraphs 34 through 37 purportedly contain descriptions of excerpts from films shown on HBO or Showtime and opinions regarding the character of the films and the need to prosecute. The state has not yet charged anyone with illegal distribution of any of these particular films; this evidence is immaterial to a facial challenge. Paragraph 24 dicusses the vote on S.B. No. 309 overriding the Governor's veto. This evidence is also immaterial to the constitutional issue before the court. Paragraphs 29 through 33 concern the practice of scanning, HBO contracts, cable operators' ability to delay movie showings, advertising practices and rating methods. These factual allegations lack verification and the showing of competency and personal knowledge required by Rule 56 of the Federal Rules of Civil Procedure. Even if the court were to overlook these procedural deficiencies, this evidence is immaterial to the issue before the court.

The parties disagree about other facts without creating any genuine or material factual issues. Paragraphs 25 through 28 concern cable industry growth, the general manner of cable program distribution, the monopolistic effects of cable systems and the extent of lock box use. The plaintiffs object to the relevance and materiality of these paragraphs but otherwise take only limited exception to the facts. In addition, there is no source provided to support the claims in detail. The court is of the opinion that the degree of difference between the parties is

of no material importance in resolving the issue before the court.

The court has considered the remaining factual allegations, contained in paragraphs 1 through 23, for such assistance as they may provide in understanding and construing the Decency Act. Paragraphs 1 through 18 contain undisputed facts relating to the legislative history of the Act, the Attorney General's advisory opinion interpreting the Act, the parties involved, the claims made and the nature of the cable TV industry. Paragraphs 19 through 23 refer to the legislature's Cable Television Intent Statement, including selected excerpts from individual legislators.

C. *The Miller Test*

The overbreadth doctrine evidences the United States Supreme Court's grave concern for the protection of first amendment rights. In *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), the Court held that obscenity is not protected by the first amendment. However, the difficulty came in articulating precisely what obscenity is. Although some thought that they knew obscenity when they saw it,[4] a comprehensive "definition" of obscenity did not emerge until 1973 in the case of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

In *Miller* the Court noted that "in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities." *Id.* at 22-23, 93 S.Ct. at 2613-2614. The *Miller* Court required that state statutes be "carefully limited" so as not to intrude upon legitimate expression. *Id.* at 23-24, 93 S.Ct. at 2614-2615.

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[4] *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (concurring opinion).

Thus, the Court set forth a comprehensive three part test for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest [citations omitted]; (b) whether the work depicts or describes, in a pattently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 93 S.Ct. at 2615.

In order to be found obscene, the material challenged must meet all three of the prongs of the *Miller* test. Material that does not do so is by definition not obscene and therefore protected from obscenity laws.[5] Utah already has an obscenity statute which comports with the requirements of *Miller*. *See* Utah Code Ann. § 76-10-1201 to -1228 (1978 & Supp.1983); *State v. Piepenburg*, 602 P.2d 702 (Utah 1979); *Piepenburg v. Cutler*, 649 F.2d 783 (10th Cir.1981). Yet the Cable Decency Act is broader. The statute regulates "indecent" material and does not limit itself to material that is legally obscene. It is evident that the Cable Decency Act does not equate indecency with obscenity.

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[5] As the Supreme Court noted in *Miller*, state laws "must be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, *and* which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973) (emphasis added). The *Miller* test is a three part test. *Smith v. United States*, 431 U.S. 291, 299, 97 S.Ct. 1756, 1763, 52 L.Ed.2d 324 (1977). Material is not obscene under *Miller* unless all three parts of the test are satisfied. *United States v. Tupler*, 564 F.2d 1294, 1297 (9th Cir. 1977).

In view of the perspective given by *Miller*, the statute is overbroad for two reasons. First, the law does not address either prong (a) or prong (c) of the *Miller* test. The Decency Act does not require, as prong (a) does, that the material appeal to the "prurient interest." Further, the law does not require that the material, taken as whole, "lack serious literary, artistic, political, or scientific value," which prong (c) demands.

Second, some of the Utah statutory definitions fail to comply adequately with prong (b) of the *Miller* test. To fall within prong (b), material must depict or describe sexual conduct in a patently offensive way. Under the Utah statute material is indecent if it is patently offensive for the time, place, manner and context shown, whether or not the material depicts or describes sexual conduct. Cable Decency Act § 1702(4).

These are results that the *Miller* Court sought to avoid. The *Miller* Court balanced the interest of freedom of expression and the legitimate interest of the state in regulating materials that depict sexual conduct. *Miller*, 413 U.S. at 23-25, 27, 93 S.Ct. at 2614-2615, 2616. But the failure of the legislature to incorporate adequately all three prongs of the *Miller* test means that protected speech may be prohibited. This is because cable TV operators would be subject to civil penalties plus costs and attorney's fees for distributing material that, taken as a whole, does not appeal to the prurient interest. These penalties would also chill distribution of material that may have serious literary, artistic, political, or scientific value. The first amendment seeks to protect these critical and substantial values. The Cable Television Programming Decency Act fails to incorporate these values and is therefore an unconstitutional regulation of cable television.

In addition, the statute's separability clause cannot save it from overbreadth. The Act as a whole fails to satisfy the *Miller* requirements. This Court cannot

rewrite the statute to add in the *Miller* requirements for the legislature. The separability doctrine cannot save a statute which in significant respect fails to incorporate constitutionally mandated protections.

D. *The Scope and Application of FCC v. Pacifica Foundation*

Defendants urge upon the court that *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), modifies *Miller*'s constitutional mandate. They argue that *Pacifica* expands the legitimate scope of state regulatory powers beyond the limits articulated in *Miller*. Defendants further contend that *Pacifica* established guidelines that the Utah Act follows.

1. *The Application of Pacifica to the Present Case*

Pacifica involved the broadcast of a recorded monologue delivered by the satiric humorist George Carlin before a live audience in California. The monologue, entitled "Filthy Words," contained language that both parties agreed was "indecedent" yet not "obscene" as the Court defined that term in *Miller*. The respondent's radio station broadcast the monologue at 2:00 in the afternoon. A man who heard the broadcast from his car radio while driving with his young son complained to the FCC about the content of the monologue. *Id.* at 730, 98 S.Ct. at 3030.

The FCC considered the man's complaint and issued a declaratory order which provided that the radio station " 'could have been the subject of administrative sanctions.' " *Id.* Although the FCC did not impose formal sanctions, it placed the order in the station's license file for consideration at the time of license renewal. *Id.* The FCC noted that if it received additional complaints the Commission would decide if formal sanctions would be necessary. These potential sanctions included immediate revocation of the station's license, a cease and

desist order, a fine, denial of license renewal or imposition of a short term renewal. *Id.* at n. 1.

In support of its declaratory order, the Commission argued that broadcasting is fundamentally different from other types of communication. Accordingly, broadcasting deserved different treatment from other forms of speech. Four reasons supported this rationale:

> (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people's privacy interest is entitled to extra deference, [citation omitted]; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is scarcity of spectrum space, the use of which the government must therefore license in the public interest.

Id. at 731 n. 2, 98 S.Ct. 3031 n. 2.

The respondent Pacifica Foundation challenged the decision of the Commission. In a plurality opinion the United States Supreme Court upheld the FCC.

Defendants assert that the holding in *Pacifica* controls the present case. The court disagrees for the following three reasons. First, *Pacifica* is subject to factual limitations. Second, subsequent authority specifically limits *Pacifica.* Third, fundamental differences between the broadcast medium and cable television require that *Pacifica* not be extended to cable television.

a. *The factual Limitations of Pacifica.*—The holding in *Pacifica* is narrow. The Court merely agreed that the FCC had the statutory authority to take note of past program content when deciding whether to renew a broadcast license. Although the FCC has no statutory power to "censor" broadcasts by excising indecent material before it is broadcast, it may impose sanctions by refusing to renew the license of stations who broad-

cast such material. *Id.* at 735-738, 98 S.Ct. at 3033-3035. The Court itself stressed the factual limitations of its holding:

> It is appropriate, in conclusion, to emphasize the narrowness of our holding. This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission's decision rested entirely on a nuisance rationale under which *context* is all important. The concept requires consideration of a host of variables. The time of day was emphasized by the Commission. The content of program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant.

Id. at 750, 98 S.Ct. at 3041 (emphasis added and footnote omitted).

Moreover, the concurring opinion viewed the holding even more narrowly. Justice Powell felt that "the Commission's order was limited to the facts of this case." *Id.* at 761 n. 4, 98 S.Ct. at 3047 n. 4. This view is supported by what the Court allowed. The Court deferred to the FCC and relied on its expertise in regulating station licenses.

Because the factual basis of its holding is very narrow, *Pacifica* does not validate the Decency Act. Stressing that the material at issue was broadcast in the mid afternoon, *see id.* at 750, 98 S.Ct. at 3041, the Court did not approve regulation at all times of day. The Utah statute, under the circumstances stated therein, imposes a fine upon cable operators who distribute material outlawed by the statute at *any* time. The attorney general's

guidelines purport to allow adult material to be presented from midnight to 7:00 a.m. These guidelines do not cure the constitutional infirmity. *See* discussion *infra* at 1114-1115.

Furthermore, the Court only approved a very mild penalty. The FCC did not immediately revoke the station's license, issue a cease and desist order, impose a fine, deny license renewal or impose a short term renewal. The penalty imposed was only a notation of the complaint in the station's license file. This penalty may have had no impact on the station's day to day operation, other than to cause the station to broadcast the monologue in the evening. *Id.* at 760, 98 S.Ct. at 3046 (concurring opinion).

The Utah Act subjects the cable operators to a potential fine of $1,000 for the first offense and escalates to $10,000 for a second offense as well as reasonable costs and attorney's fees for distributing material outlawed by the statute.[6] Although the cause of action is not technically criminal, it does establish an increased penalty for repeated showings and is manifestly intended to deter distribution of indecent material. The Commission's action caused Justice Powell to write: "since the Commission may be expected to proceed cautiously, as it has in the past, [citation omitted] I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights." *Id.* at 761-62 n. 4, 98 S.Ct. at 3046-47 n. 4. The *Pacifica* Court was closely divided, with four Justices dissenting and two concurring. If the penalty had been greater the result in the case may have been different. *Pacifica* cannot be read to allow all state and local governments to regulate cable content in accord with their respective views of indecency by imposing civil fines.

b. *Subsequent Case Law Limits Pacifica.*—The narrowness of the holding in *Pacifica* is supported by the

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[6] Utah Code Ann. § 76-10-1704 (Supp. 1983).

case of *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983). *Bolger* is the only case since *Pacifica* in which the Supreme Court has authoritatively considered whether *Pacifica* applies to any medium other than broadcast. In *Bolger* the Court struck down a federal statute which prohibited the mailing of unsolicited advertisements for contraceptives. Justice Marshall, who dissented in *Pacifica*, wrote for the Court. He noted that "[o]ur decisions have recognized that the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communication." *Id.* 103 S.Ct. at 2884. According to the Court in *Bolger*, the ruling in *Pacifica* was justified because broadcasting was uniquely pervasive and " 'accessible to children, even those too young to read.' " *Id.* (quoting *Pacifica* 438 U.S. at 748, 98 S.Ct. at 3040). But the Court felt that the "receipt of mail [was] far less intrusive and uncontrollable" than the broadcast in *Pacifica*. *Id.*[7] The Court refused to extend *Pacifica* to a medium other than broadcast. A reasonable inference may be drawn that the Court desired to limit *Pacifica* to its facts.

In addition, the Court in *Bolger* rejected arguments that are similar to claims that the defendants advance in this case. Defendants assert that some persons will be offended by some programs shown on cable television. Defendants' Amendment Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment at 20 (filed Mar. 22, 1984). Further, the defendants assert that the Utah statute helps parents protect their children from exposure to indecent material. *Id.* at 26.

In *Bolger* the Court considered similar arguments. There the government advanced two justifications for

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[7] The plaintiffs argue that cable television is also less intrusive and more controllable than broadcast. *See infra* Section D. 2 of this opinion.

the ban on the distribution of contraceptive advertising. First, some recipients of the advertising might be offended by it. Second, the statute aided parents' attempts to control the sex education of their children.

In rejecting the first justification, the Court explained that "[r]ecipients of objectionable mailings, however, may " 'effectively avoid further bombardment of their sensibilities simply by averting their eyes." ' [citation omitted] Consequently, the 'short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.' ". *Id.* 103 S.Ct. at 2883. The logic of *Bolger* is inconsistent with defendants' claim that the first amendment allows civil nuisance fines to be imposed upon persons who distribute cable material to adult subscribers.

The Court also rejected the argument that the interest of parents in controlling the sex education of their children was sufficient to overcome the commercial speech rights involved. *Id.* at 2884. Although recognizing that the parental interest was substantial, the Court concluded that the prohibition that protected this interest was too restrictive and interfered with the rights of adults to receive this material. *Id.* Thus, the Court found unsolicited commercial mailings that contained contraceptive advertising protected by the first amendment. By authorizing fines that create a de facto ban of some cable material, the Decency Act imposes a restriction inconsistent with *Bolger* and far "more extensive than the Constitution permits, for the government may not 'reduce the adult population . . . to [seeing] only what is fit for children.' " *Id.* (quoting *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524, 526, 1 L.Ed.2d 412 (1957)).

Furthermore, in *Bolger* the Court classified the unsolicited advertisements for contraceptives as commercial speech. *Id.* 103 S.Ct. at 2880-81. Commercial speech is

entitled to less protection than cable broadcasting,[8] yet the Court in *Bolger* rejected the rationales advanced by the defendants in the present case.

c. *The Fundamental Differences Between Cable and Broadcast Media Distinguish Pacifica From the Present Case.—Pacifica* validated limited regulation of indecency in the broadcast medium. The present case concerns regulation of a different medium. This is a significant distinction.

The physical scarcity of broadcast spectrum space justifies governmental regulation of the use of that space. "There is a fixed natural limitation upon the number of stations that can operate without interfering with one another." *National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 213, 63 S.Ct. 997, 1008, 87 L.Ed. 1344 (1943). The regulation of the broadcast medium is vital as a "traffic control" device. Licensing is required to avoid interference between stations; without governmental rationing of broadcast frequencies, chaos would result. *See id.*

It has long been established that the FCC's role as a "traffic controller" has included a duty to insure that broadcast licenses are used in the public interest. Broadcast frequencies are scarce public resources; this physical

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[8] Commercial speech is subject to broader regulation than traditionally protected speech. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 2879, 77 L.Ed.2d 469 (1983). And despite the profit inherent in movies, books, magazines and newspapers, the Court has held that they are entitled to the complete panoply of first amendment protections. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S.Ct. 777, 780-81, 96 L.Ed. 1098 (1952). Only when the primary purpose of the speech is to sell another product is such speech characterized as commercial. *Valentine v. Chrestensen*, 316 U.S. 52, 55, 62 S.Ct. 920, 921, 86 L.Ed. 1262 (1942). The primary purpose of cable TV is not to sell another product; cable TV is the product, must like movies, books, magazines and newspapers. Thus, cable TV is not commercial speech within the Court's definition.

scarcity justifies allocation according to the public interest. *Pacifica* 438 U.S. at 731 n. 2, 98 S.Ct. at 3031 n. 2. The FCC's duties to protect the public interest justify limited program content regulation in the broadcast medium to insure the best programming for the most people. To promote this interest, the FCC has always had the power to review the content of completed broadcasts in deciding whether to renew licenses. *See id.* at 735, 98 S.Ct. at 3033. The FCC's action in *Pacifica* was an exercise of this power. The limited regulation validated in *Pacifica* is therefore merely an extension of the long tradition of indirect content regulation accomplismment through the license renewal process. *Pacifica* upheld a type of regulation appropriate to the unique characteristics of the broadcast medium.

Because of its special characteristics, broadcasting is the form of communication that has received the most limited first amendment protection. *Id.* at 748, 98 S.Ct. at 3039. In the cable medium, the physical scarcity that justifies content regulation in broadcasting is not present. The Court in *Pacifica* deliberately limited its discussion to the broadcast medium.

Amicus Morality in Media, Inc. argues that *Pacifica* applies to the present case because both broadcast and cable are "scarce media." Seizing on scarcity as the justification for broadcast regulation, *amicus* tries to prove that cable is a scarce only has one cable franchise, it is argued that cable television is "economically" scarce. *Amicus* claims that this "economic" scarcity, like the "physical" scarcity characteristic of the broadcast medium, justifies content regulation.

It is not clear from the record before the court whether the cable medium truly is scarce in the "economic" sense discussed above. Under the new Policy Act, states may allow as many or as few cable franchises as they choose. Policy Act § 621(a)(1). Yet even

if the cable medium is "economically" scarce, this scarcity does not justify content regulation like that in the broadcast medium. *See, e.g., Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C.Cir.1977). This is true because cable is not limited to a finite number of channels the way broadcasting is. The demand for cable services determines the number of cable channels. The number of additional channels, in a technical sense, is subject to extensive expansion. *See, e.g., Home Box Office, Inc. v. Wilkinson*, 531 F.Supp. 987, 1002 (D.Utah 1982). As a result, there is no danger of interference between channels. The government therefore need not "control traffic" by rationing channls. As long as the material carried on cable channels is protected by the Constitution, licensing authorities need not police the content of those channels in the public interest, because no physically scarce public resource is involved. The supply and demand of the market place will determine the type of programming that will be successful. The public interest in receiving diverse information, an interest which the market might not adequately respect, is protected by the new Policy Act. The "special access" channels established by the Policy Act guarantee a variety of programs. *See* discussion *supra* Part I of this opinion; Policy Act §§ 612, 611.

2. *The Application of Pacifica's Rationale to the Present Case*

Defendants attempt to show that *Pacifica*'s rationale applies to cable television. The Court's reasoning in *Pacifica* was twofold. First, broadcasting has a pervasive presence which might intrude into the home and violate an individual's right to be left alone. Second, children may easily obtain access to indecent broadcast material, undermining both the "government's interest in the 'well-being of its youth' " and parents' authority over their children. *Id.* 438 U.S. at 748-50, 98 S.Ct. at 3039-41.

a. *Interference with the Right of Privacy.*—Defendants argue that cable television is more pervasive than the FM broadcasting at issue in *Pacifica.* Therefore, defendants claim, indecency on cable television can be regulated through civil sanctions. This analysis oversimplifies the *Pacifica* Court's decision. The Court did not say that pervasiveness by itself establishes a right to regulate protected expression. According to the Court, pervasiveness which *results* in an unwarranted intrusion upon one's right to be left alone justifies regulation of FM broadcasts. That is, the right to be left alone in one's own home outweighs the first amendment rights of those who wish to intrude into that home. *Id.* at 748, 98 S.Ct. at 3039.

The practical and critical distinction between *Pacifica* and the present case is apparent: cable television is not an uninvited intruder. As the FCC observed in its *amicus curiae* brief submitted to this court:

> First, cable is a subscriber medium, generally only available if the person who views it has affirmatively contacted the cable system and asked that a wire be brought into his home and attached to his television set. Without that voluntary act, there is no cable programming. Second, as to certain interstate-transmitted services, particularly as to entertainment channels such as HBO, Showtime, and the Movie Channel, a subscriber must usually pay a premium in addition to its subscriber fee in order to receive service. Otherwise, the signal is scrambled both aurally and visually, precluding reception in the home. Third, a subscriber may, if it so chooses, acquire a "lock box" which prevents reception of any particular cable programming without his authorization. [Fourth], television guides, providing advance notice of the nature of upcoming program offerings, are almost always available.

Memorandum for the Federal Communications Commission as *Amicus Curiae* at 5-6.

The distinction that the FCC and plaintiffs urge is that cable TV is not an intruder but an invitee whose invitation can be carefully circumscribed.[9] *See Pacifica* at 748-49, 98 S.Ct. at 3039-40. Because a subscriber must initiate the service, there is no uninvited intrusion into the privacy interest that the Court articulated in *Pacifica*. The individual who complained about Carlin's monologue never subscribed to radio programs. In addition, the complainant did not pay an additional fee to be able to listen to Carlin's monologue, as a subscriber to HBO, Showtime or the Movie Channel must. No lock box device even existed. In addition, it does not appear that a radio program guide provided any information in advance to warn potential listeners of the content of Carlin's monologue.

b. *The Interests of Children.*—Defendants argue alternatively that the state's interest in protecting children justifies regulation of indecency. In *Pacifica* the Court wrote that the "ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting." *Id.* at 750, 98 S.Ct. at 3041. In *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct 1274, 20 L.Ed.2d 195 (1968), the Court upheld a New York law that prohibited the sale of "harmful" indecent material, not legally obscene, to persons under 17 years of age. The concerns emphasized in *Ginsberg v. New York* consisted of two separate interests that justified a different constitutional standard for minors. First, the state has an interest in the well-being of its youth. Second, parents have an interest in exercising authority over their children.

(1) *The State's Interest in the Well-Being of its Youth.* In *Ginsberg* the governmental and parental interests listed

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[9] The Cable Policy Act requires that all cable operators must offer to their customers "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." Policy Act § 624(d)(2)(A).

above gave support to the same conclusion that the law was valid. In contrast, defendants set parental and governmental interests at odds with each other. Defendants allege that "not all parents will exercise [the] necessary degree of control. Many parents may be indifferent to this material or ignorant of its harmful effect." Defendants' Amended Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment at 26 (filed Mar. 22, 1984). In so arguing, defendants make a fundamental departure from *Pacifica*. According to the defendants, since not all parents will do their job in limiting their children's access to indecent material, the state must step in.

In drafting the Decency Act, the legislature addressed the admirable goal of protecting children from deleterious material. In the intent statement of the Decency Act, the legislators wrote that "children have access to cable television and, in many cases, are unsupervised by parents." *Id.* at 2. Thus, the legislators sought to assist parents in their supervisory role.

The language of the statute provides that civil fines apply only to material that "is presented in a patently offensive way for the time, place, manner and context in which the material is presented." Utah Code Ann. § 76-10-1702(4) (Supp.1983). This language, defendants argue, indicates that the legislature intended to prohibit presentation of "indecent" material only during the daytime. Defendants claim that *Pacifica* allows the state to channel indecent material to the early morning hours (12:00 a.m. to 7:00 a.m.) because of the interests of children.

Although protecting children is a very desirable and legitimate goal, the Act itself does not mention children anywhere. It does not provide any systematic procedure for protecting children. Section -1702(4) provides no limiting principle consistent with applicable constitutional standards. Even assuming *arguendo* that *Pacifica* vali-

dates a prohibition limited to the daytime, the statutory language does not channel indecency to specific viewing hours. The legal infirmities of the statute are so great that this court could not so limit the statute even through purposive construction without engaging in improper judicial legislation. Thus, the scope of the language is so uncertain as to chill legitimate expression in a way that the overbreadth doctrine forbids.

Even though the language in section -1702 is constitutionally insufficient, the Attorney General argues that he has promulgated rules which cure any defect. These rules provide for nonenforcement during the "adult viewing hours" (midnight to 7:00 a.m.). The statute does not provide for any such rulemaking authority. In addition, if a subsequent attorney general decides to rescind the guidelines, protected speech will be threatened. This analysis assumes, without deciding, that such guidelines would be sufficient to cure any constitutional infirmity.

Moreover, localities possess an independent right to enforce the Decency Act. *Id.* § 76-10-1704(2). In addition, that statute provides that this "act does not preclude the . . . right of cities, counties, or other political subdivisions from further regulating the distribution of indecent material over any cable television system or pay-for-viewing television programming." *Id.* § 76-10-1707. The Attorney General can neither prevent local government from enforcing the law to its fullest extent nor avert local enactment of other similarly inhibitory laws.

A further fact that must be taken into account is that the Act does not consider the rights of consenting adults under *Miller* to view nonobscene material. In *Pacifica* Justice Powell's concurrence emphasized the importance of protecting the rights of adults while at the same time insulating children from indecency. Justice Powell feared that the *Pacifica* ruling might "have the effect of 'reduc(ing) the adult population . . . to (hearing) only what is fit for children.' [citation omitted] This argu-

ment is not without force." *Pacifica*, 438 U.S. at 760, 98 S.Ct. at 3046. Justice Powell concluded that the holding of the Court "does not prevent respondent Pacifica Foundation from broadcasting the monologue during late evening hours when fewer children are likely to be in the audience." *Id.* at 760, 98 S.Ct. at 3046. Thus, *Pacifica* seems to preserve the right of adults to listen to Carlin's monologue on the radio. Utah's cable television law would prevent adults from exercising their rights in a manner consistent with the rationale of *Pacifica*.

(2) *The Parental Interest in Supervising Children.*— Restrictions in the Utah Act may well be inconsistent with the right of parental control articulated in *Pacifica* and *Ginsberg*. The enforcement of the Act could result in a ban of certain defined materials that may have serious literary, artistic, political or scientific value and that some parents want to show their children. Under Utah's law they could not do so, even though rulings of the Supreme Court allow parents to provide materials for their children that the children themselves cannot purchase: "the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children." *Ginsberg v. New York*, 390 U.S. at 630, 88 S.Ct. at 1275 (footnote omitted).

Thus, the distinctions between *Pacifica* and the present case are manifest. *Pacifica* does not authorize the regulation attempted by the Utah Legislature. At best *Pacifica* stands for the proposition that a federal regulatory agency can monitor consumer complaints directed at broadcasters who operate in the public domain. The differences between radio and cable made *Pacifica* easily distinguishable and contradict defendants' argument.

3. *The 11th Circuit Case of Cruz v. Ferre Supports This Court's Treatment of Pacifica*

While the court prepared this opinion, the 11th Circuit decided the case of *Cruz v. Ferre*, 755 F.2d 1415

(11th Cir.1985). *Ferre* adds further support to this court's conclusion that *Pacifica* does not control the resolution of the present case. In *Ferre* the 11th Circuit considered the constitutionality of a Miami, Florida ordinance that provided for suspension or termination of the licenses of operators who knowingly distribute indecent material on cable television. The *Ferre* court held that the ordinance was unconstitutionally overbroad because it was not limited to obscenity and applied without regard to the time of day or the ability of parents to control their children's access to unsuitable cable programs. In reaching this result, the court explicitly distinguished *Pacifica*, using an analysis similar to this court's.

The *Ferre* court recognized, as this court has, that cable television "does not 'intrude' into the home," that parents can significantly control their children's access to cable and that the *Bolger* case largely limited *Pacifica* to its facts. *Cruz v. Ferre*, 755 F.2d 1415, 1420-22 (11th Cir.1985). Although the enforcement procedure in *Ferre* was different from the Decency Act's,[10] the *Ferre* court relied on the same factors as this court in determining that *Pacifica* is not useful precedent.

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[10] The Miami enforcement procedure differed from the Decency Act's in two respects. First, violation of the ordinance could mean that an operator's license could be suspended for up to nine days or revoked. *Cruz v. Ferre*, 755 F.2d 1415, 1417 (11th Cir. 1985). The Decency Act provides for fines but does not give power to revoke a license. In theory, under the Decency Act an operator could broadcast indecent material as long as he paid the fines, costs and attorney's fees. As a practical matter, this course of action would probably prove to be too costly to the Utah cable operator. Viewed in this way, the sanctions in the two laws are analogous in effect.

Second, the ordinance in *Ferre* provided that the Miami city manager was to be the prosecutor, fact-finder and judge. *Id.* at 1416-17. The *Ferre* court held this procedure to be a violation of due process. Under the Utah Act, the attorney general or local prosecutor brings the action against an offending operator. An independent fact-finder would determine whether the operator had violated the Act. *See* Utah Code Ann. § 76-10-1704.

E. *The Utah Law as a Time, Place and Manner Restriction*

Defendants argue that the Act, limited by the attorney general's guidelines, operates as a legitimate time, place and manner restriction and can be upheld on that basis. The phrase "time, place, and manner" is a legal term of art. The Supreme Court has sustained such restrictions when they regulate without regard to content, serve a significant governmental interest, and leave open ample alternative channels for communication. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 515-17, 101 S.Ct. 2882, 2896-97, 69 L.Ed.2d 800 (1981).[11]

Although the Decency Act purports to regulate cable material according to "the time, place, and context in which the material is presented," the Act cannot qualify as valid time, place, or manner restriction. This is because the Utah law and the attorney general's guidelines regulate according to content. The statute regulates according to content because it provides that fines will only be imposed when the material distributed violates the specific standards set forth in section -1702. The Attorney General states that "I do not plan to enforce the Act *based on any program containing indecency* which begins after midnight or which ends by seven o'clock in the morning." Cable Television Programming

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[11] The defendants cite *Young v. American Mini Theatres*, 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), for the proposition that there are exceptions to the content neutrality requirement when juvenile audiences are involved. Defendants' Amended Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment at 37-39 (filed Mar. 22, 1984). This argument fails for two reasons. First, no Court majority adopted the proposition. The citation is to the dissenting opinion. *Young* at 85-86, 96 S.Ct. at 2459-2460. The concurring opinion says that the regulation challenged in that case is not a time, place or manner restriction at all. *Id.* at 82 n. 6, 96 S.Ct. at 2458 n. 6. Second, even if an exception for juvenile audiences existed, this opinion demonstrates that the scope of the Utah law extends far beyond the interests of children.

Decency Act of 1983, Op.Att'y Gen. No. 83-001, p. 10 (October 17, 1983) (emphasis added). Thus, the Attorney General distinguishes between permissible and impermissible cable material by reference to its content. *See Metromedia*, 453 U.S. at 516, 101 S.Ct. at 2897. Therefore, the Act cannot be sustained as a valid time, place or manner restriction.

Moreover, constitutional time, place and manner restrictions cannot be so vague as to infringe upon protected speech. The Supreme Court has noted that first amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. [citations omitted] Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963).

The Decency Act does not regulate with such "narrow specificity." This is because in determining whether material is indecent under the Act, the fact-finder must consider "the time, place, manner, and context in which the material is presented." Utah Code Ann. § 76-10-1702 (Supp.1983). The Act does not indicate to the fact-finder how a particular time, place, manner, or context should be considered in determining whether or not specific material is indecent. The words "time, place, manner, and context" neither provide the fact-finder with sufficient guidance nor adequately limit the scope of the Act to cure the constitutional infirmities discussed above. In so doing, the Act leaves prosecutors, judges and juries free "to pursue their personal predilections," [12] because the limiting principles contained in *Miller* are not present in the Act.

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[12] *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974).

Because the meaning of the words "time, place, manner, and context" is unclear, section -1702 does not provide the cable operators with notice of what material can or cannot be shown. Thus, operators may be deterred from distributing protected material because they are uncertain whether the showing of such material will subject them to the Act's sanctions. The Constitution requires "fair notice or warning," and legislatures must set reasonably clear guidelines for triers of fact. *Smith v. Goguen*, 415 U.S. 566, 572-73, 94 S.Ct. 1242, 1246-47, 39 L.Ed.2d 605 (1974). This statute provides neither fair notice or warning nor reasonably clear guidelines and is therefore void for vagueness.

III. CONCLUSION

Cable television is a powerful form of communication. Used properly, it can edify and inspire as well as entertain. Used improperly, it can seriously damage the quality of life that we have and reduce public tastes to their lowest common denominator. Following Supreme Court precedent, today's ruling delineates an area in which private individuals, particularly parents, must assume an important responsibility for maintaining a decent society. The first amendment puts "the decision as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971).

IV. ORDER

Based on the foregoing analysis this court concludes that the Utah Cable Television Programming Decency Act is unconstitutionally overbroad and vague, and void on its face.

As a result of this ruling, the court also necessarily holds, by reason of its analysis in Part I, that the Cable Communications Policy Act pre-empts the Utah Cable Television Programming Decency Act.

IT IS THEREFORE ORDERED that the plaintiffs' motion for summary judgment is granted, and the defendants' motion for summary judgment is denied.

Plaintiffs are directed to prepare a judgment reflecting the court's ruling and permanently enjoining the defendants from enforcing the Cable Television Programming Decency Act.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

C-83-0551A and C-83-0581A
(Consolidated)

COMMUNITY TELEVISION OF UTAH, INC., COMMUNITY CABLE OF UTAH, INC., UTAH SATELLITE, INC., WASATCH COMMUNITY T.V., INC.,

and

CONNIE R. JONES, LYNN F. JONES, CAROLINE A. SNOW, RALPH MCLEARY, KAY ULRICH, ED ULRICH, WAYNE WILLIAMS, as individuals and as representatives of a class of persons similarly situated,

and

HOME BOX OFFICE, INC.,

Plaintiffs,

v.

HON. DAVID L. WILKINSON, Attorney General of the State of Utah, individually and in his official capacity and as a representative of the class of all persons empowered to enforce the Cable Television Programming Decency Act,

Defendants.

[Filed June 28, 1985]

ORDER GRANTING PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES IN JUDGMENT

INTRODUCTION

On April 10, 1985, the court granted summary judgment for the plaintiffs in this case. The court directed the plaintiffs to prepare a judgment reflecting the ruling. On April 29, 1985, the plaintiffs submitted a proposed judgment which included an award of attorneys' fees under 42 U.S.C. § 1988. At the same time, the plaintiffs moved to include an award of attorneys' fees in the judgment. Because an appeal of the April 10 ruling appears likely, the plaintiffs urge only that the judgment should include an entitlement to "reasonable" fees. The plaintiffs acknowledge that final calculation of the fees should await the promised appeal. The question here is whether the court should include an award of reasonable attorneys' fees as part of the judgment.

The parties agree that 42 U.S.C. § 1988 governs the issue before the court. In civil rights cases, § 1988 alters the traditional "American rule" that each party bears its own fees. § 1988 provides that, in a civil rights case, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." It is important to note that case law limits the court's discretion in these matters. Precedent establishes that prevailing plaintiffs should ordinarily recover fees unless "special circumstances" would render such an award unjust. *See Love v. Mayor of Cheyenne*, 620 F.2d 235, 236 (10th Cir. 1980). The court must therefore determine whether "special circumstances" preclude an award of attorneys' fees in the present case.

I. EFFICIENT DISPOSITION OF THE FEE ISSUE

The defendants urge the court to defer ruling on the fee issue. According to the defendants, a ruling on fees should follow the decision in the promised appeal. The defendants claim that it would be inefficient and wasteful for the court to rule now.

The defendants advance no good reasons for the court to defer. The parties have briefed and argued the fee issue, and the court is intimately familiar with the details of the case. The court believes that considerations of efficiency require a ruling at this time. If the defendants appeal the final judgment, the Court of Appeals will have all relevant issues before it at one time.

II. THE INDIVIDUAL PLAINTIFFS

In their opposition memorandum, the defendants distinguish between the plaintiffs who are individuals and the corporate plaintiffs. The defendants concede that the court should award fees to the individual plaintiffs. Because no special circumstances dictate otherwise, the individual plaintiffs are entitled to reasonable attorneys' fees under § 1988.

III. THE CORPORATE PLAINTIFFS

According to the defendants, the court should not award fees to the corporate plaintiffs. The defendants claim that the corporate plaintiffs' ability to pay legal fees is a "special circumstance" which preclude a fee award. According to the defendants, the purpose of § 1988 is to encourage plaintiffs with meager means to vindicate their rights. The corporate plaintiffs have millions of dollars in assets. The defendants maintain that the prospect of a fee award under § 1988 did not affect the corporate plaintiffs' decision to litigate.

The corporate plaintiffs do not deny that their assets are substantial. These plaintiffs merely argue that their ability to pay counsel is not a "special circumstance" precluding a fee award.

The case law supports the plaintiffs' position. The Fifth Circuit has determined that ability to pay does not affect the entitlement to fees. *See International Society for Krishna Consciousness, Inc. v. Collins*, 609 F.2d 151 (5th

Cir. 1980). The Ninth Circuit agrees that it is irrelevant whether an action would have been brought in the absence of § 1988. *Ackerley Communications v. City of Salem, Oregon*, 752 F.2d 1394, 1397 (9th Cir. 1985), *cert. denied*, —— S.Ct. —— (1985).

The defendants rely heavily upon *Zarcone v. Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979), the case which announced the "bright prospects" rule. In that case, the court denied an award of attorneys' fees because the "prospects of success" were "sufficiently bright to attract competent private counsel on a contingent fee basis." 581 F.2d at 1044. The "bright prospects" rule depends upon the notion that the purpose of § 1988 is to remove financial barriers to civil rights suits:

> . . . the principal factor to be considered by the trial judge in exercising his discretion is whether a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorneys' fees would be paid if he were successful.

Id. Zarcone therefore directly supports the defendants' position.

The Tenth Circuit has strongly implied that ability to pay should not affect the entitlement to fees. In 1980, the Tenth Circuit expressly reserved the question whether ability to pay is relevant to the fee determination. *Love v. Mayor of Cheyenne*, 620 F.2d 235, 237 (10th Cir. 1980). In a later case, however, the same court rejected the "bright prospects" rule of *Zarcone*. *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983) (en banc). The "bright prospects" rule derives from the view that the purpose of § 1988 is to remove financial barriers to civil rights suits. *See id.* at 1501. In rejecting the "bright prospects" rule, the Tenth Circuit indicated that § 1988 has *numerous* purposes. One purpose is to facilitate civil rights litigation. § 1988 also penalizes obstructive litiga-

tion by civil rights defendants and deters civil rights violations, *see id.* at 1501; these two purposes are achieved by fee awards to rich and poor alike. Tenth Circuit precedent therefore strongly implies that ability to pay does not affect entitlement to fees.

The Tenth Circuit also indicates that the special circumstances rule only applies in the extraordinary case:

> While there have been decisions denying attorney's fees as unjust, these have been few and very limited. For example, one court declined to assess attorney's fees against defendants who were powerless to provide the remedy sought by the prevailing plaintiff [citations omitted]. The court did assess attorney's fees against the remaining defendants. Another court denied attorney's fees to a prevailing party whose conduct the court found outrageous. *Scheriff v. Beck*, 452 F. Supp. 1254, 1260 (D. Colo.) (Plaintiff's claim "was precipitated by an irrational, deliberate scheme to involve [defendant] in some type of litigation").

Love v. Mayor of Cheyenne, 620 F.2d at 237. Extraordinary factors like those identified by the Tenth Circuit are not present in the case before this court. Following the direction of the Tenth Circuit, this court holds that ability to pay attorneys' fees is not a special circumstance which precludes a fee award under § 1988.

The defendants also urge that administrative problems preclude an award of fees to the corporate plaintiffs. According to the defendants, an apportionment of fee payments throughout the defendant class would create significant administrative difficulties. In support of their argument, the defendants cite Judge Jenkins' order denying attorneys' fees in *Home Box Office, et al. v. Wilkinson et al.*, C-81-0331J (D. Utah Feb. 26, 1982), a case similar to the present case. Although the administrative difficulties in *Home Box Office* were similar to those in

the present case, the problems of apportionment are surmountable. The defendants imply the same by conceding the fee award to the individual plaintiffs. Vaguely described by the defendants, the administrative difficulties do not justify denying a fee award.

The *Home Box Office* order also emphasized that the defendants had not engaged in *conduct* that violated the plaintiffs' rights. The court acknowledges that the defendants in the present case acted in good faith by agreeing not to enforce the cable law pending outcome of the litigation. The Tenth Circuit has, however, ruled that a fee award is appropriate for a successful challenge to an unconstitutional ordinance even if the defendant acted in good faith. *Love v. Mayor of Cheyenne*, 620 F.2d 235, 236-37 (10th Cir. 1980). The court finds no special circumstances which should preclude an award of attorneys' fees to all plaintiffs in this action.

The court HEREBY GRANTS the plaintiffs' motion to include an award of reasonable attorneys' fees in the judgment. The court therefore approves the proposed judgment submitted by the plaintiffs on April 29, 1985. The date of the final judgment will conclude with the date of this order.

DATED this 28 day of June 1985.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States Senior Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

C-83-0551A and C-83-0581A
(Consolidated)

COMMUNITY TELEVISION OF UTAH, INC., COMMUNITY CABLE OF UTAH, INC., UTAH SATELLITE, INC., WASATCH COMMUNITY T.V., INC.,

and

CONNIE R. JONES, LYNN F. JONES, CAROLINE A. SNOW, RLPH MCCLEARY, KAY ULRICH, ED ULRICH, WAYNE WILLIAMS, as individuals and as representatives of a class of persons similarly situated,

and

HOME BOX OFFICE, INC.,

Plaintiffs,

v.

HON. DAVID L. WILKINSON, Attorney General of the State of Utah, individually and in his official capacity and as a representative of the class of all persons empowered to enforce the Cable Television Programming Decency Act,

Defendants.

[Filed June 28, 1985]

JUDGMENT

Pursuant to the memorandum of opinion filed herein as well as Rules 56 and 58 Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED AND ADJUDGED:

1. The Court has subject matter jurisdiction of these consolidated cases pursuant to 28 U.S.C. §§ 1331 and 1343. Venue is appropriate under 28 U.S.C. § 1391 since the claims arose in the District of Utah and the party Defendants are Utah residents.

2. There is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law.

3. The Utah Cable Television Programming Decency Act, Utah Code Ann. § 76-10-1701 to -1708 (Supp. 1983), is unconstitutionally overbroad and vague, and void on its face.

4. The Cable Communications Policy Act pre-empts the Utah Cable Programming Decency Act.

5. Plaintiffs' motion for summary judgment is granted, and the defendants' motion for summary judgment is denied.

6. Defendants are permanently enjoined from enforcing the Cable Television Programming Decency Act.

7. Costs are awarded to Plaintiffs.

8. The Plaintiffs are entitled, pursuant to 42 U.S.C. § 1988, to an award of reasonable attorneys fees. This Court reserves judgment on the specific award and shall set such matter down for consideration at a later date on appropriate application.

DATED this 28 day of June, 1985.

BY THE COURT:

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States Senior District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEPTEMBER TERM—SEPTEMBER 8, 1986

Before the Honorable James K. Logan, Honorable Bobby R. Baldock, Circuit Judges and Honorable Dale Saffels, District Judge *

(D.C. Nos. C-83-0551A and C-83-0581A)

CONNIE R. JONES; LYNN F. JONES; CAROLINE A. SNOW; RALPH MCCLEARY; KAY ULRICH; ED ULRICH; WAYNE WILLIAMS, as individuals and as representative of a class of persons similarly situated; COMMUNITY TELEVISION OF UTAH, INC.; COMMUNITY CABLE OF UTAH, INC.; UTAH SAFELLITE, INC.; and WASATCH COMMUNITY T.V., INC.,

Plaintiffs-Appellees,

HOME BOX OFFICE, INC.,

Plaintiff-in-Intervention-Appellee,

vs.

HONORABLE DAVID L. WILKINSON, Attorney General of the State of Utah, in his official capacity and as representative of a class of all persons empowered to enforce the Cable Television Programming Decency Act (S.B. 309),

Defendant-Appellant,

MORALITY IN MEDIA, INC., NATIONAL CABLE TELEVISION ASSOCIATION, INC., THE FREEDOM OF EXPRESSION FOUNDATION, INC.,

Amici Curiae.

---

* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Utah, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 85-2157

CONNIE R. JONES, *et al.*,
Plaintiffs,

vs.

DAVID L. WILKINSON, Attorney General
of the State of Utah,
Defendant.

[Filed Nov. 21, 1986]

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that David L. Wilkinson, Attorney General of the State of Utah, the defendant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the three-judge circuit court affirming the judgment of the District Court for the District of Utah, Central Division granting summary judgment and awarding attorneys' fees, entered on September 8, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 21st day of November, 1986.

/s/ David L. Wilkinson
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MAILING CERTIFICATE

I hereby certify that I mailed a true and accurate copy of the foregoing notice of appeal, postage prepaid, this 21st day of November, 1986, to the following at their respective addresses:

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APPENDIX F

CABLE TELEVISION PROGRAMMING DECENCY ACT

Section

76-10-1701. Short title—Application.

76-10-1702. Definitions.

76-10-1703. Distribution of indecent material as nuisance.

76-10-1704. Enforcement—Civil penalties.

76-10-1705. Application limited to cable and pay-for-viewing programming.

76-10-1706. Defenses—Expert testimony as to indecency not required.

76-10-1707. Local regulation and application of other state laws not precluded.

76-10-1708. Separability.

76-10-1701. Short title—Application.

This act shall be known and may be cited as the "Cable Television Programming Decency Act." This act shall apply to cable television systems and pay-for-viewing television programming.

76-10-1702. Definitions.

As used in this act:

(1) "Knowingly" means an awareness, whether actual or constructive, of the character of the material involved. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the material involved and if a failure to inspect

or observe is either for the purpose of avoiding the disclosure or is negligent.

(2) "Distribute" means to send, transmit, retransmit, telecast, disseminate, or cablecast by any means, including by wire or satellite, or to provide material to send, transmit, retransmit, telecast, disseminate, or cablecast.

(3) "Contemporary community standards" means those current standards in the vicinage where a nuisance alleged under this act has occurred or is occurring.

(4) "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:

(a) A human sexual or excretory organ or function; or

(b) A state of undress so as to expose the human male or female genitals, public area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

(c) An ultimate sexual act, normal or perverted, actual or simulated; or

(d) Masturbation

which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

76-10-1703. Distribution of indecent material as nuisance.

A person shall be deemed to have maintained a nuisance when, as a continuing course of conduct, he knowingly distributes indecent material within this state over any cable television system or pay-for-viewing television programming.

76-10-1704. Enforcement—Civil penalties.

(1) Enforcement of this act shall be by civil process only and subject only to the civil sanctions contained herein.

(2) An action under this act may be brought by the Utah state attorney general or by any county or city attorney in any district court where the nuisance alleged has occurred or is occurring and shall be subject to the Utah Rules of Civil Procedure.

(3) A person found to have maintained a nuisance shall be subject to a forfeiture in an amount not greater than $1,000, plus costs and reasonable attorney's fees.

(4) If a person has previously been found to have maintained a nuisance under this act, he shall be subject to a forfeiture in an amount not greater than $10,000, plus costs and reasonable attorney's fees.

76-10-1705. Application limited to cable and pay-for-viewing programming.

This act shall apply solely to cable television systems or pay-for-viewing television programming and shall not apply to over-the-air broadcasting by a radio or television station located within the State of Utah and licensed by the Federal Communications Commission pursuant to Part 73, Subpart E, of the FCC Rules and Regulations (47 CFR 73.601, et seq.). Nothing herein, however, shall preclude the application of this act to program material

originally broadcast or otherwise distributed by broadcast facilities located within or without the Sate of Utah and thereafter distributed by a cable television system or pay-for-viewing television programming located within the State of Utah.

76-10-1706. Defenses—Expert testimony as to indecency not required.

(1) It is an affirmative defense to an action under this act that the distribution of indecent material was restricted to institutions or persons having scientific, educational, govermental, or other similar justification for distributing indecent material.

(2) It is not a defense to an action under this act that the person was an employee, or otherwise was required to violate any provision of this act incident to his employment.

(3) No party to an action under this act shall be required to introduce expert witness testimony as to whether the material is or is not indecent, or as to any element of the definition of indecency, including contemporary community standards.

76-10-1707. Local regulation and application of other state laws not precluded.

This act does not preclude the following:

(1) The right of cities, counties, or other political subdivisions from further regulating the distribution of indecendent material over any cable television system or pay-for-viewing television programming; or

(2) The application of other laws of this state regulating the distribution of indecent material over any cable television system or pay-for-viewing television programming.

76-10-1708. Separability.

If any clause, sentence, paragraph or part of this statute or its application to any person or circumstance shall for any reason be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair, or invalidate the remainder of this statute or its application to other persons or circumstances but shall be confined in its operation to the clause, sentence, paragraph, persons or circumstances, or part directly involved in the controversy in which the judgment shall have been rendered.

APPENDIX G

CABLE TELEVISION INTENT STATEMENT

SUB.S.B.309—CABLE TELEVISION PROGRAMMING DECENCY ACT

In enacting this legislation, it is the intent of the Legislature to protect, in a broad sense, the rights of free speech guaranteed by the First Amendment to the U.S. Constitution as interpreted by the United States Supreme Court.

The technological advances in the communications industry during the past decades, have resulted in new and varied forms of communications. In addressing the impacts of these new forms of communication, the courts and legislative bodies have legitimately applied the protection of the First Amendment differently, depending upon the specific medium involved. Their interpretations have considered such factors as the pervasive presence in the community, the extent to which it invades the privacy of the home, and the accessibility of the medium to children.

In recent years, cable television has begun to establish a pervasive and widely available influence in the community, particularly the home. After a careful evaluation of the cable television medium, the legislature finds that cable television programming may legitimately be regulated because (1) children have access to cable television and, in many cases, are unsupervised by parents; (2) cable television receivers are in the home, a place where the individual's privacy interest is afforded and entitled to extra deference; (3) unconsenting adults may, without warning, tune into a cable television program where offensive language or depictions are being transmitted; and (4) because, as a practical matter, there is a limit to the number of cable television stations that a community will be able to franchise.

In view of these considerations, and with special awareness of the delicate task of balancing these concerns with the First Amendment rights to cablecasters and others, it is the purpose of this legislation to regulate the transmission of indecent material by cable television.

APPENDIX H

[SEAL]

THE ATTORNEY GENERAL
STATE OF UTAH

DAVID L. WILKINSON
Attorney General

236 State Capitol Telephone 801-533-5261
Salt Lake City, Utah 84114

DATE: 17 October 1983

FORMAL OPINION NO. 83-001

REQUESTED BY:

Rodney S. Page, Esq.
Davis County Attorney

PREPARED BY:

David L. Wilkinson, Attorney General

REGARDING:

Cable Television Programming Decency Act of 1983

QUESTIONS:

1. Is the Act a "Time, Place and Manner" regulation of cable TV and, if so, does it require that there be some time during a 24-hour period when "indecent" programming may be shown without violating the Act?

2. If the Act does require that there be some time during the 24-hour "day" when indecent pro-

gramming may be shown without violating the Act, what are the hours of such a time?

3. For a defendant to have engaged in a "continuing course of conduct" so as to violate the Act, how many times must he/she have presented indecent material and within what time duration?

4. What reliance may be placed on the fact that a movie shown on cable TV has been rated G, PG or R by the Motion Picture Association of America (MPAA)?

ANSWERS:

1. Yes, see text.
2. See opinion.
3. At least 3 times in a 90-day period.
4. See opinion.

OPINION

STATEMENT OF PROBLEM

In your letter dated September 26, 1983, as supplemented by our telephone conversation shortly after your letter arrived, you indicated that although the Cable Television Programming Decency Act ("the Act") enacted in the 1983 General Session of the Legislature is not presently being enforced pending the outcome of a motion for preliminary injunction lodged by plaintiffs-cablecasters,[1] the four specific points you wish to have

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[1] On the day the lawsuit was filed by the cablecasters, *(Community TV of Utah v. Wilkinson)*, this office agreed not to enforce the Act pending the Court's determination of their motion for preliminary injunction. Since then, the parties have agreed to have the Court decide the motion for preliminary injunction as part of the Court's determination of the whole case on its merits.

me address, as listed above, should be the subject of an attorney general's opinion pursuant to UCA 67-5-1(6) (1953). I concur, and submit the following by way of opinion and guidelines for your use.

ANALYSIS

1. *Is the Act a "Time, Place and Manner" regulation of cable TV and, if so, does it require that there be some time during a 24-hour period when "indecent" programming may be shown without violating the Act?*

In answering this question, one should bear in mind that the State of Utah is not required to regulate the content of cable TV programming to the maximum extent permitted by the United States and Utah Constitutions and, indeed, is not required to regulate it at all. Whatever the outer limits of permissible state regulation under applicable constitutional law[2] are, the Legislature was free to enact a bill which stopped short of reaching those outer limits. Secondly, one should remember that before and after the passage of the Act, Utah's principal statutory means of combatting the real and perceived dangers to society of pornography in its broadest sense (not as a legal term of art) was, and undoubtedly still is, Utah's anti-obscenity law. A comparison of the criminal sanctions attaching to the latter (U.C.A. §§ 76-10-1204, 1214, (1981 Supp.)) with the modest civil sanctions attaching to the Act should leave little doubt as to which law would have a greater effect upon the showing of the material at which the two laws are aimed, respectively. Much of the public discussion which surrounds the Act seems to lose sight of this fact. Any material shown on cable TV at whatever time of day or night which comes within the proscription of Utah's anti-obscenity law subjects those legally responsible to criminal sanctions, including prison time.

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[2] United States Constitution, Amendment I; Utah Constitution, Article I, Section 15.

As you no doubt know, the Act was passed because the Legislature perceived the need for an additional statutory weapon to deal with cable TV programming which did not come under the carefully drawn legal definition of "pornography" which Utah adopted after the United States Supreme Court in *Miller v. California* clarified how far a state could go in altogether *prohibiting* certain material—material which then, and, in many jurisdictions, is still now widely available in bookstores, adult theaters, and similar public outlets. The Legislature expressly intended to "regulate the transmission of [non-obscene] indecent material by cable television" while at the same time to "protect, *in a broad sense*, the rights of free speech guaranteed by the First Amendment to the U.S. Constitution as interpreted by the United States Supreme Court." Cable Television Intent Statement, Substitute S.B. No. 309, read by its sponsor, Sen. Paul Rogers, on the floor of the Senate, and by its House floor sponsor, Rep. James Moss, on the floor of the House of Representatives on March 2, 1983 and March 7, 1983, respectively (emphasis added). A copy of the "Intent Statement" is attached herewith. Nowhere in the Act, its intent statement, or anywhere else in its legislative history, is there any express indication of an intent to regulate cable TV programming to the maximum extent allowed by the First Amendment. Indeed, the language of the intent statement quoted above, and underlined, suggests, if anything, the Legislature's desire to weigh any doubt as to the Act's constitutionality in favor of the "rights of cablecasters and others." *Ibid.* It would have been easy for the Legislature to say the Act was intended to regulate the content of cable TV programming to the maximum extent permitted by the free speech clause of the First Amendment to the United States Constitution.[3] However, this was not done.

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[3] This was done in the context of Utah's "Long Arm Statute." U.C.A. § 78-27-22 (1953).

Keeping in mind these preliminary observations, it is not a particularly close question as to whether the Legislature intended that there be some period during a 24-hour "day" during which "indecent material might be shown on cable TV without violating the Act. The controlling language is found in the definition of indecent material. That definition, found in Section 2(4) of the Act,[4] reads:

> (4) "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:
>
> (a) A human or sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, pubic area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or
>
> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation
>
> which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way *for the time, place, manner and context in which the material is presented* (emphasis added).

That the drafters of the Act intended it to be a "time, place and manner" *regulatory* act, and not a *prohibitory* act, is abundantly clear from the language they employed in the last two lines of the Act's key definition. Their use

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[4] The Act has been codified as §§ 76-10-1701 through 1708 by The Allen Smith Company. The Act itself did not attempt to "spot" itself within the Utah Code. The Act should not have been "spotted" in the Criminal Code since it is not criminal in nature.

of the phrase "time, place, manner and context" was no accident. That language did not appear in the Legislature's ill-drafted 1981 bill (U.C.A. § 76-10-1228 (1981 Supp.)), struck down as unconstitutional in *Home Box Office v. Wilkinson*, 531 F. Supp. (D. Utah 1982). Nor did it appear in the definition of indecency included in the ordinance of Roy City, struck down in *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982). Nor does it appear in the definition of indecent material found in the "model" espoused by Morality in Media, a New York City-based national anti-obscenity organization, from which model much of the rest of the definition of "indecency" is taken.[5] The choice of the phrase, "time, place, manner and context" was deliberate and obviously designed to import a substantial body of First Amendment case law into the Act.

The consequences of the Legislature intending the Act as a "time, place, and manner" regulation are legally crucial. If a regulation is deemed a time, place, and manner regulation of speech, the strict scrutiny normally required under First Amendment analysis does not apply. *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2620 n. 17 (1982). Rather, time, place, and manner restrictions must be upheld if they are found to reasonably advance important state interests. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n. 18 (1980). To be

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[5] Morality in Media's model definition of indecency, in their Model Cable Television Law, reads:

> (1) (e) "Indecent material" shall mean material which is a representation or verbal description of:
>
> 1) a human sexual or excretory organ or function; or
>
> 2) nudity; or
>
> 3) ultimate sexual acts, normal or perverted, actual or simulated; or
>
> 4) masturbation;
>
> which, under contemporary community standards for cable television, is patently offensive.

reasonable, however, time, place, and manner restrictions on communication must leave open some alternative times, places, and manners, for that communication to occur. *Schad v. Mt. Ephraim*, 452 U.S. 61, 75-76 (1981); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Kovaks v. Cooper*, 336 U.S. 77, 83-85 (1949). It appears that a total ban on communication, even if limited to a total ban on one particular medium, probably will not be found a reasonable time, place, or manner restriction. *Schneider v. State*, 308 U.S. 147, 163 (1939); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 540, 556 (1975).

From the foregoing United States Supreme Court caselaw, it appears clear that the Act's usage of the phrase "time, place, manner and context" in its definition of indecent material, requires that indecent material not be banned at all times from being shown on cable TV.[6] It may be argued that the Legislature did not know the consequences of using the words "time, place, manner and context," and subjectively intended to ban indecency on cable TV at all times. However, there is no evidence of this. To the contrary, the legislative history of the Act shows the Legislature knew exactly what it was doing in using those words.

The chief sponsor of S.B. No. 309, Sen. Paul Rogers (R, Orem), said in explaining the bill:

> "Senate Bill No. 309 is a permissive bill admittedly. so it does allow much of what may be personally offensive to me or to many others to still be cablecast in Utah. It is not a ban, it is not a prohibition. It does however set up minimum criteria which when implemented will tend to have a restrictive influence

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[6] The Act's intent statement, quoted *supra*, begins by expressing the Legislature's intent "to protect, in a broad sense, the rights of free speech guaranteed by the First Amendment . . . *as interpreted by the Supreme Court* (emphasis added)."

> over indecent material which . . . [would otherwise] be widely distributed and cablecast during all different times of the day . . . [Y]ou may have masturbation or intercourse taking place over your cable television screen, that at least it may be at a time when fewer younger members of our population for example may be present . . . ."

Also during the veto-override session, Sen. Karl Swan (D, Tooele), one of only two senators to address questions to the bill's principal draftsman on the floor of the Senate, stated:

> "If it [S. 309] has the effect of restricting the times that some of the other [indecent] things are shown . . . I think the public will be well served . . . and the First Amendment will still be very viable."

Finally, the House floor sponsor, Rep. Moss (R, Orem) stated, in introducing the bill in the veto-override session:

> "[The bill] is not in fact a prohibition on broadcast [sic] of all sexual activity over cable television . . . Now prior attempts in this area have required a blanket prohibition on certain forms of speech that go beyond the standard of pornography . . . . The bill that you have before you is a much more moderate bill than that and would not preclude even the kind of things that were broadcast in the Pacifica case. . . . There can obviously then be times during the course of a day or night when given the time, place, manner and context of broadcast [sic], material would not be found to be indecent. . . . Now that is not a blanket prohibition."

Later, in summing up argument for the bill, Rep. Moss said: "This bill will not take the place of parents. As I've indicated to you, there will still be great amounts of what I consider to be indecent material that will go out over the cable television system."

Between the time the Act was initially passed by overwhelming margins of both houses and the time the Governor vetoed it, I wrote and sent the Governor an opinion, which he had requested, on the bill's constitutionality. The Legislature, of course, overrode the veto *after* that opinion issued. The opinion received considerable publicity in the local media within a day or two after its issuance on March 29, 1983. This office gave copies of it to a number of individual legislators before the Legisuature overrode the Governor's veto. Under the circumstances, that opinion would seem to have become part of the Act's legislative history. That opinion, a copy of which is attached hereto, makes clear my belief that the Act was intended to *regulate*, not *prohibit*. In a word, I felt the Act was a time, place, and manner regulation, which "does not totally ban all nonobscene, indecent transmissions from cable television." (p. 8 of the opinion).

I expressly refrain from opining that the First Amendment does not allow a total prohibition of indecency on cable TV. To answer your specific question, I do not need to delineate the precise limits of the First Amendment. It appears clear that even assuming a total ban would be constitutionally permissible, the Utah Legislature chose not to impose such a ban. The answer to both parts of your first question must therefore be in the affirmative.

2. *If the Act does require that there be some time during the 24-hour "day" when indecent programming may be show vithout violating the Act, what are the hours of such a time?*

In answering this question, I hasten to state the obvious: No public lawyer or judge can specify the precise hours of each 24-hour period when indecency may be lawfully shown under the Act without functioning to some extent as a legislature. This is obvious because the Legislature simply did not specify the precise hours

in the Act. However, this is not to say the Legislature did not have in mind a governing idea as to what those hours should be. A key legislative finding, expressed in the Intent Statement, is that "children have access to cable television and, in many cases, are unsupervised by parents." This legislative finding lies at the heart of the United States Supreme Court's opinion in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The *Pacifica* case was well known to the Legislature in its deliberations over the Act. It was inferred to many times in the legislative debates, being characterized by Rep. Moss, for instance, as "the prime case upon which the bill you are now considering rests." *Pacifica* is also the keystone of my opinion to the Governor on the Bill's constitutionality, which opinion was before the Legislature when it overrode his veto. Fully half of that nine-page opinion is devoted to a discussion of that case and its applicability to this Act. It is not engaging in a fiction of statutory construction to say that the Legislature imported the principles of that case into its Intent Statement. That case, combined with common sense, suggests the Legislature's intent that indecent material could at most only be shown lawfully during "late evening hours."

In emphasizing the narrowness of the Commission's order in *Pacifica*, (which the Court upheld), Justice Powell, in a crucial concurring opinion, with which Justice Blackmun joined, stated:

> "On its face, [the order] does not prevent respondent Pacifica Foundation from broadcasting the monologue *during late evening hours* when fewer children are likely to be in the audience. . ." *Ibid.*, at 760 [emphasis added].

The Powell concurring opinion stressed the factor of parental supervision of children as a key consideration in its rationale.

> "The Commission's primary concern was to prevent the broadcast from reaching the ears of unsupervised children who were likely to be in the audience at that hour. In essence, the Commission sought to 'channel' the monologue to hours when the fewest unsupervised children would be exposed to it. See 56 F.C.C. 2d, at 98. In my view, this consideration provides strong support for the Commission's holding." *Ibid.*, at 757.

Justice Powell also differentiates the broadcast media from other disseminators of "this kind of speech" in that whereas "[s]ellers of printed and recorded matter and exhibitors of motion pictures and live performances may be required to shut their doors to children" without restricting the access of adults to such material,

> "such a physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children." *Ibid.*, at 758.

The above observations come within my power (and duty) to render opinions to county attorneys. In attempting to delineate the precise "late evening hours" during which indecency may lawfully be shown under the Act, I exercise my supervisory powers over county attorneys pursuant to U.C.A. 67-5-1(5) (1953). In other words, I cannot specify these hours by way of rendering an opinion of law, since obviously the Legislature in its wisdom has chosen not to specify them; however, as the Attorney General with supervisory powers over all county attorneys and as one of the public attorneys charged with enforcing the Act, I am empowered to issue enforcement guidelines to promote a uniform application of the Act. That is to say, my statements may not be

controlling as to what may lawfully be broadcast and when, but they will be controlling as to what this office will or will not do by way of enforcing the Act.

In issuing such guidelines, I feel compelled to look for clues in the *Pacifica* opinion as the lodestar in this "relatively new and difficult area of the law." *Ibid.*, at 756, Powell, J. Unfortunately, such clues are scarce. One such clue, however, is found in the dissenting opinion of Judge Leventhal when the case was decided by the Court of Appeals, 556 F. 2d 9 (1977). Judge Leventhal was unwilling to overturn the Commission's order disciplining the radio station, but he was somewhat troubled, based on the record before him, with the order's suggestion that the material in question might only be broadcast during "the late hours of the evening." He noted that the Commission's order carried with it a "limitation of time—*the afternoon.*" Although he found no fault with that time limitation in the order, he offered dicta to suggest that the expansion of that time limitation to include the *early evening* raised different considerations, i.e., a greater percentage of children exposed to broadcasting might be under parental supervision at that time. Thus he tangentially raised, although in dictum, the difficult question facing us here. However, the concurring justices were apparently unwilling to follow Judge Leventhal's lead and to question the Commission's suggestion that late evening hours might be the only time indecency might be broadcast. Justice Powell's observation that "[*d*]*uring most of the broadcast hours,* both adults and unsupervised children are likely to be in the broadcast audience," appears to suggest that when he and Justice Blackmun refer to "late evening hours," they mean those hours in contradistinction to the early evening hours referred to by Justice Leventhal, to whose "thoughtful opinion" they expressly refer. *Ibid.*, p. 757. In other words, Justice Powell and Justice Blackmun, along with the three-member plurality, do not take ex-

press issue with the Commission's language appearing to relegate material like the Carlin monologue to late evening hours.

At this point, any specification of late evening hours must contain an element of arbitrariness. If one were to specify those hours as being, for instance, from 2 a.m. to 4 a.m., or even from 1 a.m. to 6 a.m., a court would likely consider the time span too restrictive and could hold the application of the Act unlawful. The key question is, at which hours are the fewest children unsupervised, considering the First Amendment need to have more than just a nominal time span duration during which indecency may be lawfully shown. Weighing this question against the language of the Act's Intent Statement protecting, "*in a broad sense*," rights of free speech, I do not plan to enforce the Act based on any program containing indecency which begins after midnight or which ends by seven o'clock in the morning, and I would advise and direct (to the extent of my statutory authority) county attorneys to do likewise.

I reiterate the second preliminary observation I made on page 3 of this opinion: Utah's anti-obscenity law, with its criminal sanctions, is available for use against cablecasters which present material at any time of the day or night which is pornographic in the legal sense. This office intends to enforce the Utah anti-obscenity law against cablecasters where appropriate and urges county and city attorneys to do likewise.

3. *For a defendant to have engaged in a "continuing course of conduct" so as to violate the Act, how many times must he/she have presented indecent material and within what time duration?*

As in the case of your second question, this question requires me to mix my separate and distinct functions of rendering opinions of law, on the one hand, and exer-

cising my supervisory powers over county attorneys on the other.

It is clear from both case law and common sense that "continuing course of conduct" does not mean one incident. *Calvin v. Conlish*, 520 F.2d 1, 6 (1975, U.S. 7th Circuit); *Maryland Telephone Union v. Chesapeake & Potomac Tel. Co. of Md.*, 187 F. Supp. 101, 109 (1960, U.S. Dist. Ct. Md.). What the cases do not tell us, however, is the frequency necessary to constitute a continuous course of conduct. Nor do the legislative debates surrounding the Act help. Pursuant to my supervisory powers, I suggest, as I did in answering your second question, that you adopt the same guidelines as I, which are that no action will be brought by this office unless and until the same defendant has presented indecent material at least three times within a ninety-day period. Of course, indecent material shown between midnight and seven a.m. will not be counted by this office in determining the degree of frequency necessary to constitute a continuing course of conduct.

4. *What reliance may be placed on the fact that a movie shown on cable TV has been rated G, PG or R by the Motion Picture Association of America (MPAA)?*

The act is not limited in its applicability to movies. To the extent that movies are involved, however, this office plans to observe the following guidelines:

If a movie has received a PG rating, this office will action is contemplated.

If a movie has received a PG rating, this office will presume it contains no indecency.

If a movie has received an X rating, this office will presume it contains indecency.

However, the fact that a movie has been rated R by the MPAA will raise no presumption either way.

Each R-rated movie would have to be approached on an individual basis.

I urge, pursuant to my supervisory powers, that all county attorneys follow these guidelines. I also urge that city attorneys follow these same guidelines.

Very truly yours,

/s/ David L. Wilkinson
DAVID L. WILKINSON
Attorney General

DLW:rma
Attachment

[SEAL]

THE ATTORNEY GENERAL
STATE OF UTAH

236 State Capitol
Salt Lake City, Utah 84114
Telephone 801-533-5261

29 March 1983

The Honorable Scott M. Matheson
Governor, State of Utah
210 State Capitol
BUILDING MAIL

Re: *SB No. 309*

Dear Governor Matheson:

We received in the late afternoon of March 21 your letter requesting our opinion on the constitutionality of SB No. 309, The Cable Television Programming Decency Act. This bill provides that the knowing distribution of indecent material over any cable television system or pay-for-viewing television programming within the state *as a continuous course of conduct* constitutes a nuisance. A civil action may be maintained by the State Attorney General or any county or city attorney, and a civil forfeiture of up to $1,000.00 plus costs and attorneys' fees may be assessed against any person found to have violated the act. For subsequent violations, the forfeiture may be as high as $10,000.00. The act explicity provides a defense for persons having scientific, educational, or governmental justifications for distributing material which would otherwise be proscribed.

It is my opinion that SB No. 309 is not unconstitutional and could be successfully defended if challenged in court.

I. REGULATION OF THE DISTRIBUTION OF NON-OBSCENE INDECENT MATERIAL OVER CABLE TELEVISION IS NOT PER SE UNCONSTITUTIONAL.

A. *The United States Supreme Court Has Upheld The Regulation of Indecent Material.*

The foundation authority for the constitutionality of the regulation of nonobscene "indecent" material is *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The First Amendment analysis of Justice Stevens, who wrote the plurality opinion for the Court, provides some clear guidelines for permissible state regulation of the distribution of nonobscene indecent material.

Pacifica involved the issuance by the FCC of a Declaratory Order reprimanding Pacifica Foundation for its radio station broadcasting a twelve-minute monologue by George Carlin, "Filthy Words," one afternoon in October, 1973. A complaint was received from a man who stated that he heard the broadcast while driving in his car with his young son. The FCC did not impose formal sanctions but put the Declaratory Order into the station's license file to be considered in the event that further complaints were received. The station owner appealed to the D.C. Court of Appeals, which overturned the FCC Order. Then the FCC appealed, and the Supreme Court reversed the judgment of the Court of Appeals.

The Supreme Court initially interpreted the statute giving the FCC the authority to regulate broadcasters and found that it authorized the regulation of nonobscene indecent material, as well as purely obscene material. Then the Court proceeded to the First Amendment question, which it defined as "whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances." 438 U.S. at 746. In his plurality opinion, Justice Stevens concluded that

it did not, and upheld the action of the FCC on the basis of five critical points:

(1) the regulation of the content of communication is sometimes permissible;

(2) First Amendment analysis varies greatly according to the medium through which the message is communicated;

(3) broadcasting is entitled to less First Amendment protection because of its "pervasiveness presence in the lives of all Americans" and because of the accessibility of children to the broadcast media;

(4) the FCC action constituted a reasonable restriction of the time, place, and manner of broadcasting indecent material; and

(5) the sanction imposed was noncriminal.

The Court acknowledged that there were two particularly important reasons why the First Amendment does not prohibit reasonable time, place and manner restrictions of indecent broadcasts.

> "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up an indecent phone call, but that option does not

give the caller a constitutional immunity or avoid a harm that has already taken place.

"Second, broadcasting is uniquely accessible to children, even those too young to read. . . . Other forms of offensive expression may be withheld from the young without restricting the expression at its source. . . . We held in *Ginsberg v. New York*, 390 U.S. 629, that the government's interest in the well-being of its youth and in supporting parents' claim to authority in their own household, justified the regulation of otherwise protected expression. . . . The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*, amply justify special treatment of indecent broadcasting." 438 U.S. at 748-750.

In conclusion, Justice Stevens emphasized the factors which supported the Court's judgment that the FCC action did not violate the First Amendment:

"This case does not involve a two-way radio conversation between a cab driver and a dispatcher, or a telecast of an Elizabethan comedy. We have not decided that an occasional expletive in either setting would justify any sanction or, indeed, that this broadcast would justify criminal prosecution. *The Commission's decision rested entirely on a nuisance rationale under which context is all-important.* The concept requires a host of variables. The time of day was emphasized by the Commission. The content of the program in which the language is used will also affect the composition of the audience, and differences between radio, television, and perhaps closed-circuit transmissions, may also be relevant. As Mr. Justice Sutherland wrote, a nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barn. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 388. We simply hold that when the Commission finds that a pig has entered the

parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene." 438 U.S. at 750, 751 (emphasis added).

B. *First Amendment Standards Depend Upon the Medium.*

It is clear that the First Amendment applies to the regulation of cable television. "Cable operators, like publishers and wireless broadcasters, are entitled to First Amendment protection." *Community Communications Co. v. City of Bounder, Colorado*, 660 F.2d 1370, 1377 (10th Cir. 1981), *rev'd on other grounds*, 102 S.Ct. 835 (1982); *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). Exactly how First Amendment protection will be applied to cable television is not clear.

The nature of First Amendment protection varies depending on the character of the medium being regulated. "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 501 (1981). "Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it . . ." *Id.* at n.8. "[D]ifferences in the characteristics of the new media justify differences in the First Amendment standards applied to them." *Red Lyon Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). *See also Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). Thus, the constitutionality of the regulation of indecent material transmitted over cable television systems will be assessed by First Amendment standards molded to suit that particular medium.

C. *The Pacific Standard Is Likely To Apply To Cable Television.*

Since the "nature and degree of protection afforded to First Amendment expressions in any given medium de-

pends upon the medium's particular characteristics," *Community Communications Company v. City of Boulder*, 660 F.2d at 1377, it will be necessary to compare the characteristics of cable television with those of other communications media.

It is clear that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748. On the other hand, newspapers and print media have received the greatest First Amendment protection. *Id.*; *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); Minnesota tax case issued March 29, 1983 (reported on radio), holding First Amendment prohibits a state tax on newspaper stock and printers ink.

Cable television is a new industry. To date, almost all of the litigation regarding cable television has arisen in the context of the regulation of access (mandatory access rules), channel capacity, licensing, etc. *See, e.g., Midwest Video v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); *Community Communications Co. v. Boulder City*, 660 F.2d at 1377 (10th Cir. 1981), *rev'd on other grounds*, 102 S.Ct. 835 (1982). *See further* Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment*, 54 S. Cal. L. Rev. 1001 (1981). Although a few cases examining the validity of channel access restrictions have compared cable television to newspapers, *see, e.g., Midwest Video*, 571 F.2d at 1056; *Home Box Office v. FCC*, 567 F.2d 9, 43-51 (D.C. Cir. 1977); *Community Television of Utah, Inc. v. Roy City*, —— F.Supp. —— (D. Utah, Dec. 22, 1982), the better analysis has distinguished cable television from newspapers and compared it to broadcasting. An excellent Tenth Circuit opinion in *Community Communications* held that "the attributes of cable broadcasting technology indicate that the nearly absolute strictures against direct government regulation of newspapers' dissemination of information cannot be

applied in wholesale fashion to cable operators." 660 F.2d 1377. Judge Seymour's opinion stressed two significant distinctions between cable broadcasting and newspaper printing for purposes of First Amendment analysis. First, a newspaper need not use public property to disseminate information, while cable operators, because of their need to use public domain, are tied to the public government "in a way that . . . newspapers are not." *Id.* at 1378. Second, there is the particular problem of "medium scarcity" in the cable television industry, *i.e.*, there are physical and economic limitations on the number of cable systems that can practically operate in a given geographic area which do not exist in the case of newspaper publishers. *Id.*; *see also* Kreiss, 54 S. Cal. L. Rev. at 1005. Furthermore, from the point of functional First Amendment analysis, unlike newspapers, cable television systems are not primarily "communicators, but, like broadcasters, are primarily 'conduits'." In fact, Professor Kreiss has emphasized that "[c]able systems act as conduits more than either newspapers or broadcasters." *Id.* at 1026.

Pacifica is likely to apply to cable television because the two significant factors, noted by the Court as justifying reasonable time, place and manner restrictions of the broadcast media, are present in the cable television medium also. Cable television is rapidly assuming a position of "pervasive presence" in the lives of Americans. An FCC *Information Bulletin* (March, 1982) reports that "[b]y the end of 1981 approximately 4,600 cable systems served more than 20 million subscribers in some 12,600 communities." *Id.* Cable television systems are operating in every state of the United States. *Id.* Moreover, cable television, like ordinary television, "is uniquely accessible to children, even those too young to read." *Pacifica*, 438 U.S. at 749. Like broadcast television, cable transmission "comes directly into the home," where "a different order of values obtains . . ." *Id.* at 759 (Powell, J. concurring, joined by Blackmun, J.)

In his *Roy City* opinion, U.S. District Judge Bruce Jenkins tried earnestly to distinguish *Pacifica.** He created a "laundry list" of characteristics of cable television on the one hand, and compared it with a similar list of characteristics of broadcast television and radio on the other (e.g., limited advertising versus extensive advertising; transmission through wires versus transmission through airwaves, etc.). Then he emphasized three distinctions between the two types of media which, he concluded, made *Pacifica* "irrelevant" when assessing the constitutionality of cable television regulations. "First, one may choose to subscribe or one may choose not to subscribe to a cable service." Civil No. NC 82-0122J, slip op. at 7. Second, "cable provides a larger number of channel and subject choices than does broadcast." *Id.* Finally, he insisted that cable television is not "pervasive" because "[l]iterally [pervasive] means ever-present. It is in the air, or diffused widely. In that sense broadcasting meets the definition. In that sense, it is pervasive because its medium, the air, is pervasive. Transmission by wire is not." *Id at 8.* It is very likely, however, in view of the pervasiveness of cable TV and its accessibility to children, discussed above, that the Tenth Circuit and the Supreme Court will insist upon much more sophisticated analysis of the First Amendment policies implicated than that employed by Judge Jenkins.

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* In an earlier case, *HBO v. Wilkinson*, 531 F.Supp. 987, (D. Utah 1982), Judge Jenkins inexplicably omitted any mention of *Pacifica* from his 16-page opinion, although it was cited and argued to him repeatedly.

II. S.B. 309 IS LIKELY TO BE UPHELD AS A REASONABLE TIME, PLACE AND MANNER REGULATION OF CABLE TELEVISION.

A. *Time, Place and Manner Regulations Are Not Subject to Strict Scrutiny.*

It is important to recognize that if a regulation is deemed a time, place and manner regulation of speech, the strict scrutiny normally applied under First Amendment analysis will not apply. *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2620 n.17 (1982). Rather, time, place, and manner restrictions will be upheld if they are found to reasonably advance important state interests. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 n.18. (1980).

B. *There Are Several Important State Interests Affected By S.B. 309.*

The two key interests identified by a majority of the Supreme Court as justifying reasonable regulation of nonobscene, indecent broadcasts, were protecting children and protecting the privacy of the home. 438 U.S. at 749, 749, and *id.*, at 757-762 (Powell and Blackmun, JJ., concurring). The essence of the concern is that parents are entitled to the support of the State in protecting their children from inappropriate material. Yet parents ought not to be forced to forego the benefits of a particular medium simply to protect their children from inappropriate broadcasts at times when it is more likely that large numbers of children would be in the listening or viewing audience. Moreover, there is a legitimate interest in protecting those who do not wish to view indecent material in their homes, even accidentally or inadvertently.

It is worth noting that both of these concerns were identified as the primary purposes of S.B. 309 in the Statement of Intent that was read on the floors of the

Senate and House, respectively, when S.B. 309 was introduced. A copy of that statement is attached.

C. *S.B. 309 Significantly Enhances These Important State Interests.*

To be "reasonable," time, place and manner restrictions of speech must leave open some alternative times, places and manners of communication. *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981); *Hefron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981); *Kovaks v. Cooper*, 336 U.S. 77, 85 (1949). It is clear that a total ban on communication, even if limited to a total ban on one particular medium, probably will not be found to be a reasonable time, place, or manner restriction. *Schneider v. State*, 308 U.S. 147, 163 (1939); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 540, 556 (1975).

S.B. 309 does not totally ban all nonobscene, indecent transmissions from cable television. In fact, it does not by its own terms ban any. Rather, it establishes a definite legal principle whereby the cable television industry in Utah can govern itself. That principle is that depictions or descriptions of sexual or excretory acts or functions must be transmitted only at "the time, place, manner and [in the] context" in which it would not be "patently offensive" to the "average person applying contemporary community standards for cable television." *Moreover, mere isolated incidents do not violate the Cable Television Programming Decency Act—only the distribution of indecent material "as a continuing course of conduct."* Thus, S.B. 309 is reasonable because it is flexible. It does not aim to, and will not, prevent Utahns from viewing quality movies like *Kramer v. Kramer* on the basis of the tastefully—or even distastefully—done scene or two which may offend some viewers. Rather, it aims primarily to brand as a nuisance a cable channel like "Pussycat"—already operating in other states—which

continually shows "blue" movies and which a great majority of Utahns would agree was not only patently offensive but contributory to antisocial or even criminal behavior. See *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 58 (1973), identifying as a possible state interest served by anti-obscenity laws "the public safety itself."

S.B. 309 is not vague. It propounds a principle, not an administrative regulation. But that principle is clear. Moreover, the Supreme Court emphasized in *Pacifica* that "indecency is largely a function of context—it cannot be adequately judged in the abstract." 438 U.S. at 742. The Utah Legislature has wisely chosen not to attempt to ban indecent material in the abstract. It has also chosen to have the courts, and not an administrative body like the FCC, determine whether a nuisance exists under the Act.

It is important to note that S.B. 309 does not provide criminal penalties for its violation. Rather, the sanctions are civil forfeiture. This factor was significant in the *Pacifica* analysis as well, as Justice Stevens not only mentioned it in the text of his opinion, but devoted a lengthy note emphasizing the absence of criminal sanctions in that case. 438 U.S. at 750, 739 n.13. Like in *Pacifica*, the regulatory approach of S.B. 309 is the nuisance rationale. *Id.*, at 750.

III. CONCLUSION.

It thus appears that S.B. 309 does not violate the First Amendment. If challenged, it is likely to be upheld eventually (even though Judge Jenkins of the local U.S. District Court would evidently hold that it is unconstitutional*). This bill deals, of course, with a very contro-

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* If S.B. 309 becomes law and is challenged in the United States District Court for Utah, the chances are one in three that the case would be assigned to Judge Jenkins. I am assured it was pure coincidence that both the *HBO* and *Roy City* cases were assigned to him.

versial subject, and has aroused the passions of many people. But under dispassionate constitutional analysis, it is not likely to be found to be unconstitutional per se. Of course, like any law, it could be given an unconstitutional application. That, however, would depend upon the enforcement of it. A veto of the bill on the ground that it might be applied unconstitutionally could not be supported as a veto urged by this opinion.

Very truly yours,

/s/ David L. Wilkinson
DAVID L. WILKINSON
Attorney General

DLW:rma

Attachment

P.S:. Although not germane to this opinion, response should be made to the claims that the cost of defending S.B. 309 would approach $500,000. The cost to the State of defending an earlier cable TV bill was only $5,000.

APPENDIX I

§ 558. Criminal and civil liability

Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements.